REL: December 15, 2017

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
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Montgomery, AL 36130-1555

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MEMORANDUM

CR-14-1274 Baldwin Circuit Court CC-01-169.60

State of Alabama v. Timothy Flowers; Timothy Flowers v. State of Alabama

WINDOM, Presiding Judge.

The State of Alabama appeals the circuit court's decision to grant Timothy Flowers penalty-phase relief in his post-conviction proceeding pursuant to Rule 32, Ala. R. Crim. P., and to reduce Flowers's sentences from death to life in prison without the possibility of parole. Flowers cross-appeals the circuit court's decision denying his request for guilt-phase relief.

On direct appeal, this Court summarized the facts of Flowers's crime and procedural history of his case as follows:

> "On November 28, 2000, Ruby Welch and Brenda Owens reported to police that Tommy Philyaw was missing and that they suspected he had been the victim of a crime. They told police that Owens overheard John Morrow, Flowers's codefendant, and four other individuals talking about robbing Philyaw. Police went to Philyaw's trailer and discovered a large quantity of blood on the dirt road near his trailer and Philyaw's hat near the blood. Philyaw's truck was missing. The investigation focused on Flowers and his codefendants John Morrow, Elizabeth Fillingim, Angela Morrow, and Kendall Packer, after several of the codefendants were interviewed by police and admitted their participation in the events that led to Philyaw's murder. The five codefendants agreed to rob Philyaw of his Christmas club money -- a little over $1,000. Their plan called for one of the females to lure Philyaw from his trailer, where the group would then rob him.
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> "On November 27, 2000, either Fillingim or Angela Morrow went to Philyaw's trailer and, pretending to have car trouble, asked for Philyaw's help. Philyaw followed the individual back to her car. Flowers, John Morrow, and Packer were waiting at the car, and when Philyaw arrived they began beating him with a metal pipe. They then put Philyaw in the back of his truck and drove to a secluded area. While they were driving Philyaw begged for his life and told them that he could get them more money; they continued to beat him with a pistol until they arrived at an isolated area. Flowers shot Philyaw in the back while he was lying face down in the bed of the truck. The truck was then set on fire.
>
> "Flowers led police to the body and to the shotgun used to kill Philyaw. The shotgun belonged to Philyaw. When leading police to the body,

Flowers said, 'I hope you have a strong stomach, because this is where the massacre began.'

"The victim's body was badly burned; the remains weighed 65 pounds. The forensic pathologist, Dr. Kathleen Enstice, testified that she could not conclusively state how many times Philyaw had been shot because the fire destroyed some of the evidence. She testified that Philyaw was alive when the shotgun pellets entered his chest and severed his aorta. Another pellet also entered his right shoulder. This shot was also inflicted before his death. Four pellets were recovered from the bed of the truck. Five spent shells were recovered from the scene. Enstice testified that the cause of death was multiple gunshot wounds and that it was her opinion that Philyaw was dead when his body was set on fire.

"Flowers was indicted for murdering Philyaw during the course of a kidnapping and a robbery, for murdering Philyaw while Philyaw was in a motor vehicle, for conspiring with his codefendants to kill Philyaw during a robbery, and for conspiring with his codefendants to kill Philyaw during a kidnapping. The jury convicted Flowers of two counts of capital murder—murder committed during the course of a kidnapping and murder committed during a robbery—and acquitted him of the conspiracy charges.

"A separate sentencing hearing was held before the jury. See § 13A-5-45(a), Ala. Code 1975. The jury, by a vote of 10 to 2, recommended that Flowers be sentenced to death. A presentence report was prepared. See § 13A-5-47, Ala. Code 1975. The circuit court held a separate sentencing hearing at which it heard additional mitigating evidence. See § 13A-5-47(c), Ala. Code 1975. The circuit court found as aggravating circumstances that the murder was committed during the course of a kidnapping and a robbery and that the murder was especially heinous, atrocious, or cruel as compared to other capital offenses. See §§ 13A-5-49(4) and

> 13A-5-49(8), Ala. Code 1975. The circuit court found as mitigating circumstances that Flowers had no significant history of prior criminal activity, § 13A-5-51(1), that he was 18 years old at the time of the murder, § 13A-5-51(7), that he lacked a stable home life, that his mother had died when he was 16, that he lacked an education, and that he abused drugs, § 13A-5-52. After weighing the aggravating circumstances and the mitigating circumstances the circuit court sentenced Flowers to death."

Flowers v. State, 922 So. 2d 938, 942-43 (Ala. Crim. App. 2005). On February 25, 2005, this Court affirmed Flowers's capital-murder convictions and sentences of death. Id. This Court issued the Certificate of Judgment on August 19, 2005.

On August 16, 2006, Flowers filed a Rule 32 petition challenging his capital-murder convictions and sentences of death. "Flowers later filed an amended Rule 32 petition and a second amended Rule 32 petition. The State answered each of his petitions." (C. 1277.)

On May 7, 2013, the parties deposed Flowers's lead trial counsel, William Pfeifer, Jr. "On June 10-11, 2013, August 5-6, 2013, and June 16, 2014, [the circuit court] held evidentiary hearings on Flowers'[s] second amended Rule 32 petition, at which time the parties presented evidence relating to some of the claims contained therein." (C. 1277.) After receiving post-hearing briefs from the parties, the circuit court denied Flowers's request for guilt-phase relief but granted his request for sentencing-phase relief and resentenced Flowers to life in prison without the possibility of parole.

On June 12, 2015, the State of Alabama filed a motion to reconsider, arguing, among other things, that the circuit court erred by reducing Flowers's sentences from death to life without the possibility of parole. On June 18, 2015, Flowers filed a response to the State's motion to reconsider. (C. 1381-1390.) After the circuit court failed to rule on the State's motion to reconsider, the State filed a notice of appeal. Thereafter, Flowers filed a notice of cross-appeal. In a published opinion issued today, this Court reversed the

portion of the circuit court's order resentencing Flowers to life in prison without the possibility of parole and remanded the cause to the circuit court with instructions for it to hold sentencing hearings pursuant to §§ 13A-5-46 and 13A-5-47, Ala. Code 1975. In this memorandum opinion, this Court addresses only the propriety of the circuit court's determination that counsel were not ineffective in the guilt phase and were ineffective in the penalty phase of Flowers's trial.

Standard of Review

"In a Rule 32 proceeding, both the burden of pleading and the burden of proof are on the petitioner." Reeves v. State, [Ms. CR-13-1504, June 10, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016); accord Rule 32.3, Ala. R. Crim. P. ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.").

> "The general rule is that 'when the facts are undisputed [or] an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo.' Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). On the other hand, 'where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, "[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition."' Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). Even when the disputed facts arise from a combination of oral testimony and documentary evidence, we review the circuit court's findings for an abuse of discretion and afford those findings a presumption of correctness. See Parker Towing Co. v. Triangle Aggregates, Inc., 143 So. 3d 159, 166 (Ala. 2013) (noting that the ore tenus rule 'applies to "disputed issues of fact," whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence.'"

Reeves, ___ So. 3d at ___.

Further, "'[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence.'" Id. (quoting Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008)). "Therefore, '[t]he general rules of preservation apply to Rule 32 proceedings,' Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003), and this Court 'will not review issues not listed and argued in brief.' Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995)." Reeves, ___ So. 3d at ___.

Ineffective Assistance of Counsel

The issues raised by both parties in this appeal involve claims of ineffective assistance of counsel. Regarding those types of claims, this Court has explained:

> "To prevail on his claims of ineffective assistance of counsel, [Flowers] must satisfy the two-prong test established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, he must present evidence establishing the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part and prove that these acts or omissions fall 'outside the wide range of professionally competent assistance.' Id. at 690. If he meets this burden, he must then show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' Id. at 694. 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id. 'The likelihood of a different result must be substantial, not just conceivable.' Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011) (citing Strickland, 466 U.S. at 693.
>
> "Further, the Supreme Court of the United States has explained:

> "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland, 466 U.S. at 689. 'Strickland specifically commands that a court "must indulge [the] strong presumption" that counsel "made all significant decisions in the exercise of reasonable professional judgment."' Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 1407, 179 L. Ed. 2d 557 (2011) (quoting Strickland, 466 U.S. at 689-690). Courts are 'required not simply to give the attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons ... counsel may have had for proceeding as

they did.' Cullen, 563 U.S. at 196, 131 S. Ct. at 1407 (internal citations and quotations omitted).

"Further, the presumption that counsel performed effectively '"is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. Hunt v. State, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) (quoting Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' Id. '"'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment."'"' Hunt, 940 So. 2d at 1070-71 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn Chandler, 218 F.3d at 1314 n. 15, quoting in turn Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. See, e.g., Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); Whitson v. State, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); Brooks

> v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); McGahee v. State, 885 So. 2d 191, 221-22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable.'); Williams v. Head, 185 F.3d at 1228; Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir.1983) ('[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did not sufficiently investigate [the petitioner's] background.'); Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005) ('Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty phase of [the petitioner's] trial. In a situation like this, we will presume the attorney "did what he should have done, and that he exercised reasonable professional judgment."')."

Stallworth v. State, 171 So. 3d 53, 91-93 (Ala. Crim. App. 2013).

With these principles in mind, this Court turns to the issues raised on appeal and on cross-appeal.

I.[1]

On cross-appeal, Flowers argues that the circuit court erroneously held that counsel were not constitutionally ineffective in the guilt-phase of his trial. Specifically, Flowers argues that the circuit court erroneously rejected his

[1]Because the cross-appeal relates to the first phase of the trial, this Court addresses the issues raised in the cross-appeal first.

claim that counsel were ineffective for failing to present evidence that someone else fired the fatal shots and for failing to challenge the State's forensic evidence. According to Flowers, trial counsel should have investigated and presented evidence indicating that Philyaw was murdered without Flowers's knowledge, consent, or assistance, and outside of his presence.

To support his argument, Flowers asserts that "[t]he State's theory of the case was that Mr. Flowers alone killed Philyaw by firing the shotgun five or six times into the bed of the pickup truck where Philyaw lay." (Flowers's brief, at 69.) He further asserts that he informed his attorneys that he fired the shotgun above the truck and did not shoot Philyaw. He then argues that:

> "Because there are multiple pellets in each shotgun shell, there should have been over 100 pellets near the vehicle, had Mr. Flowers fired directly into the bed of the truck at 'contact range,' as the state argued. But in fact, there were only four or five pellets found anywhere near the vehicle or the victim. Further, if buckshot pellets had been fired from a shotgun into the bed of the truck, there should have at least been indentation marks, if not holes, in the metal of the truck bed. But the State presented no such evidence of indentations or holes identified as having been caused by buckshot pellets hitting the truck. Moreover, a forensic scientist testifying for the State testified that when Philyaw's truck was burned, any lead pellets existing in the truck would have melted. As a result, if Mr. Flowers had in fact shot into the truck instead of over it, lead should have been found in the bed of the truck, even if the fire had melted the pellets."

(Flowers's brief, at 70-71.) Flowers asserts that "[t]he fact that there were only four or five pellets near the vehicle supports the account Mr. Flowers had told his lawyers all along: that he aimed high over the truck, avoiding Philyaw, who lay inside the bed of the truck." (Flowers's brief, at 71.) Flowers also argues that the State presented evidence that the gunshot wounds were contact wounds, but Flowers was

several feet away from the truck when he fired the shotgun. Further, Flowers told his attorneys that he was not present when Philyaw's truck was set on fire and that Philyaw could have been murdered then.

The circuit court addressed this claim as follows:

> "Mr. Flowers contends that this trial counsel were ineffective for failing to challenge the Prosecution's forensic evidence by presenting evidence showing that he did not shoot the victim and that 'Buckshot or Mr. Packer killed Mr. Philyaw during a robbery and kidnapping without [his] knowledge, consent or assistance' and 'outside of his presence.' Plaintiff's Post-Hearing Brief at 106-111.
>
> "As an initial matter, Mr. Flowers'[s] assertion that he could not have been convicted of capital murder if his counsel had created reasonable doubt as to whether he was the shooter is incorrect as a matter of law. Under Alabama law, it is of no real practical importance whether Flowers or one of his four co-defendants shot Mr. Philyaw. See, e.g. Turner v. State, 924 So. 2d 737, 778 (Ala. Crim. App. 2002) (explaining that the State does not have to prove that the Defendant 'was the actual one of three codefendants who committed the murder' because pursuant to Alabama law, 'it is irrelevant whether [this defendant] or one of his co-defendants killed the victim'). Instead, Alabama law provides as follows:
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> > "'[Aln individual who is present with the intent to aid and abet in the commission of an offense is as guilty as the principle wrongdoer. § 13A-2-20-23, Code of Alabama 1975. See Stokley v. State, 254 Ala. 534, 49 So. 2d 284 (1950); Robinson v. State, 335 So. 2d 420 (Ala. Crim. App. 1976), cert, denied, 335 So. 2d 426 (Ala. 1976); Heard v. State, 351 So. 2d 686 (Ala. Crim. App. 1977); Hill V. State, 348 So. 2d 848 (Ala. Crim. App. 1977),

> cert, denied, 348 So. 2d 857 (Ala. 1977). 'A conviction of one charged in the indictment with having been the actual perpetrator of a crime is authorized on proof of a conspiracy or that the accused aided and abetted in the commission of the crime. Stokley v. State, 254 Ala. 534, 49 So. 2d 284 (1950). An aider and abettor would be indicted directly with the commission of the substantive crime and the charge may be supported by proof that he only aided and abetted in its commission. Pope v. State, 365 So. 2d 369 (Ala. Crim. App. 1978).' Killough v. State, 438 So. 2d 311 (Ala. Crim. App. 1982), reversed on other grounds, 438 So. 2d 333 (Ala. 1983).'

"Price V. State, 725 So. 2d 1003, 1055 (Ala. Crim. App. 1997). See also Apicella v. State, 809 So. 2d 841, 860 (Ala. Crim. App. 2000); McWhorter v. State, 781 So. 2d 257, 272 (Ala. Crim. App. 1999). Thus, under Alabama law, '[a]s long as the appellant intentionally promoted or aided in the commission of the killing itself, whether he actually committed the murder does not affect his liability or his guilt.' Price, 725 So. 2d at 1055 (citing Lewis v. State, 456 So. 2d 413 (Ala. Crim. App. 1984)).

"Here, this Court correctly instructed the jury on the laws of complicity and accomplice liability. Because the jury was not required to find that Mr. Flowers shot Mr. Philyaw to convict him of the capital offenses of murder committed during the course of a kidnapping and robbery, Mr. Flowers cannot establish deficient performance or prejudice with respect to this claim.

"Moreover, the record demonstrates that trial counsel had sufficient strategic reasons to refute Mr. Flowers'[s] claim that his counsel should have called him as a witness to testify that he did not shoot the victim and should have presented forensic evidence showing that he did not shoot the victim. When Mr. Pfeifer was asked why he and Ms. Dixon did

not call Mr. Flowers as a witness to testify that he 'shot high and didn't think he had hit' the victim or present other evidence to show that Flowers did not shoot the victim, Mr. Pfeifer stated that they had legitimate reasons to question the effectiveness of Flowers'[s] testifying. Any such testimony offered by Mr. Flowers concerning the shots fired would have been accompanied by certain admissions that may have outweighed any positive effect produced by Mr. Flowers'[s] claims to have shot above the victim. This includes admissions that Mr. Flowers was a participant in a scheme to kidnap and rob Mr. Philyaw and that Mr. Flowers had struck Mr. Philyaw in the head with a blunt object. Also, trial counsel doubted the possible efficacy of such testimony due to several prior confessions of Mr. Flowers. The evidence in the record supports Mr. Pfeifer's testimony. See R. 69-72, 963-964, 972-973, 981.

"Due to the considerable amount of evidence tending to show that Mr. Flowers shot Mr. Philyaw, it was reasonable for his counsel to refrain from devoting a large portion of their limited time and resources pursuing the theory that Mr. Flowers did not shoot Mr. Philyaw. See, e.g., Chandler, 218 F.3d at 1318 n.22 ('Strickland's approach toward investigation "reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources."'); Foster v. Dugger, 823 F,2d 402, 405 (11th Cir. 1987) ('Counsel need not "pursue every path until it bears fruit or until all available hope withers."'). Furthermore, Counsel's strategic decision is supported by the fact that the jury was not required to find that Flowers shot Mr. Philyaw to convict him of capital murder during the course of a robbery and kidnapping.

"Similarly, it was reasonable for trial counsel to decline to challenge the state's forensic evidence. It was undisputed that Mr. Philyaw died during the course of a crime in which Mr. Flowers was a willing participant. The state had strong evidence, including admissions of Mr. Flowers, that

> he had committed acts that could have caused the death of Mr. Philyaw. Deciding to challenge the state's specific theory of how Mr. Philyaw's death occurred would have demanded an enormous amount of work for results of doubtful merits.
>
> "For the foregoing reasons, the Court finds that Mr. Flowers'[s] trial counsel were not ineffective in choosing not to present evidence showing that Mr. Flowers purposefully missed Mr. Philyaw when firing shots in his direction and challenging the state's forensic evidence. Accordingly, this claim is dismissed in accordance with Alabama Rule of Criminal Procedure 32.3 because Mr. Flowers fails to meet his burden of proving the facts necessary to entitle him to relief.

(C. 1278-81.) This circuit court's findings are supported by the record.

First, Flowers's assertion that trial counsel failed to use the lack of shotgun pellets in the truck to raise doubt regarding the State's version of the events is refuted by the record. At trial, Flowers counsel presented evidence that, with 5 to 6 shots, over 100 pellets would have been fired. Counsel established that only 4 or 5 pellets were recovered. Counsel established that there was one hole in an air tank and no indentations or holes in the truck. Counsel further established that there was no evidence of any melted pellets. (R. 731-32.) See also (R. 1203-05) (defense counsel arguing that the lack of pellets, whole or melted, raises doubt regarding the State's theory of the crime). As the State aptly described at trial, "[t]he defense has, throughout the trial, vigorously suggested several alternatives concerning how this man may have been killed, and raised the specter, how come there wasn't more than 3 or 4 pellets found?" (R. 900.)

During closing arguments, the State responded as follows:

> "And there were some things that were raised. Where are the pellets? I don't know. Were they burned? I don't know. Could they not be found? I don't know. Were they in little pieces of organs? I don't know. I don't know.

But you got the wadding. You got the testimony. And, so, what do you think happened? This is what I think happened, what the evidence shows you and what evidence you heard."

(R. 1176.) Thereafter, defense counsel argued:

"But you heard the testimony. I don't know what it all means anymore than you do, but I know it means that there's some doubt, reasonable doubt. There were twenty-four pellets in each of those shotgun shells. One hundred twenty pellets were allegedly were fired in the back of that pickup truck. Four -- four were found in Mr. Philyaw. One -- there was an indication of one hitting an air tank. So, five pellets, leaving a hundred fifteen pellets that disappeared.

"Now, the state tries to minimize that. But you remember, the doctor -- the body was burned, and she pointed to that fact. But she had no problem finding the entrance wounds, and she found no exit wounds. The prosecution says the pellets were small.

"And the expert admitted that the materials in the back of that truck were carefully sifted through by a whole team of investigators, specifically looking for this type of evidence.

"Well, they didn't find it. The prosecutor tries to explain it away with another witness, saying the pellets may have melted. But the witness admitted -- the expert admitted that they could have melted, but they wouldn't have turned to ash, they would have been there in their melted state. And all suspicious metal was turned over. And the bottom line is, there were no pellets.

"The prosecution -- I believe that Hoss Mack gave testimony that sometimes these pellets are small, and they might not have been found, could have been buried in this body. But on cross-examination, that same witness admitted that

> if a body is X-rayed, pellets are going to be found. This body was X-rayed, and there were no more pellets. No holes in that pickup truck anywhere, nowhere, not under, not around, besides, nowhere, no remnants of pellets. They were not around the body, in the body. There's no indication, whatsoever, that those one hundred fifteen pellets were in the truck. Again, I don't know what to make it. But I do know that it gives you reason to doubt the state's scenario."

(R. 1203-05.)

Thus, defense counsel did use the forensics -- lack of shotgun pellets, lack of indentations, and lack of holes -- to try to raise doubt regarding the State's theory of the crime. See (32C. 11678) (Counsel explained that he used the State's forensic evidence, lack of pellets and such, to try to show that the State's theory was incorrect). Therefore, this portion of Flowers's claim is refuted by the record and without merit. See Albarran v. State, 96 So. 3d 131, 160 (Ala. Crim. App. 2011) (recognizing that claims that are refuted by the record are without merit); McNabb v. State, 991 So. 2d 313, 320 (Ala. Crim. App. 2007) (holding that a claim that is refuted by the record is without merit and does not entitle the appellant to relief).

To the extent Flowers argues that counsel should have done more, expended more resources, and presented other witnesses to establish the relevance of the forensic evidence, his claim is without merit. Additional evidence regarding the state of the crime scene and the implication to be drawn from it would have been cumulative to evidence and argument presented at trial. "This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel." United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005) (citing Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984)). "[T]he withholding of cumulative testimony will not ordinarily satisfy the prejudice component of a claim of ineffective assistance of counsel." Taylor v. State, 352 N.W.2d 683, 687 (Iowa 1984) (citing Schrier v. State, 347 N.W.2d 657, 665 (Iowa 1984)). Further, considering the overwhelming evidence of Flowers's intent to kill Philyaw summarized below, counsel was not ineffective for

failing to expend more resources on proving facts -- the lack of pellets, holes, and indentation -- that the jury could easily understand from cross-examination of the State's witnesses. Thus, this Court cannot say that the circuit court abused its discretion by finding that Flowers failed to meet his burden to establish counsel's ineffectiveness.

Likewise, Flowers failed to prove that counsel were constitutionally ineffective for failing to present his testimony or other witnesses' testimony indicating he was not the shooter and did not intend to kill Philyaw. The State presented overwhelming evidence that Flowers was the shooter and that he intended to take Philyaw's life. For instance, Flowers confessed on multiple occasions that he hit Philyaw in the head with a pipe and shot him. Ricky Tobin, an investigator with the Baldwin County Sheriff's Department, testified that, "Flowers stated they stopped on the dirt road, and at that time, he got out and shot Philyaw five or six times...." (R. 873.) Flowers "said he shot him five or six times while [Philyaw] was lying in the back of the truck." (R. 874.) Further, during a telephone conversation Flowers had with his sister, Theresa Coleman, the following occurred:

Coleman: "Yeah. Did Y'all -- did y'all do it?"

Flowers: "Yea, they got us so I mean, we're guilty as charged."

"...

Coleman: "How could you do it?"

Flowers: "I Me [sic] and Libby didn't want to do it and they -- they talked me into doing it."

"...

Coleman: "Who else was involved?"

Flowers: "Me. It's me, Black, Buckshot, Angela and Libby."

Coleman: "Just five of you?"

Flowers: "Yeah. Libby -- Libby and Angela didn't do nothing really."

Coleman: "What did you do?"

Flowers: "I was the one shot him."

Coleman: "You shot him?"

Flowers: "Yeah."

Coleman: "You the one that shot him?"

Flowers: "Yep."

(32C. at 11897.)

Additionally, Flowers led law-enforcement officers to the location of Philyaw's body and the shotgun used to murder him. On the way to the location of Philyaw's body, Flowers was excited, "laughing and joking around," and showed no signs of remorse. (R. 849, 876.) As Flowers led law-enforcement officers to Philyaw's body, he stated, "'I hope you have a strong stomach, because this is where the massacre began[.]'" (R. 865.)

Faced with Flowers's statements, confessions, and giddy behavior when visiting the scene of the murder, trial counsel explained the decision not to have Flowers testify and tell his version of the offense as follows:

> "Q. Did you -- well, as of the end of September, had there been any investigation by you or [Dixon] or anyone else into possible guilt defense issue around Mr. Flowers telling you that he thought he shot high and didn't think he had hit anyone?
>
> "A. Well, it was -- Yeah. I mean, that was -- that was something to consider, but we had a problem with -- for one, that Tim kept confessing to doing it, you know, all these tape recordings of him saying he did

it. And even in our discussions with him, he talked about hitting [Philyaw] in the head with a pipe, I think it was.

So it wasn't as if he was -- you know, it wasn't like the girl that was cowering in the car, you know, while all this went on. He was an active participant. And without -- so it's hard to -- you know, so we didn't -- we didn't want to put him on the stand because he's going to get up there and admit to committing capital murder even if he says he shot high. And we didn't really have anyone else to put up there that could say things that would help with that other then, you know, trying to establish through the evidence that it probably wasn't the shot that killed him.

"...

"Q. I think you mentioned that before, but I'll ask you again and give you an opportunity to explain. Why didn't you call Mr. Flowers to testify to say that he thought he shot high or he didn't think he hit [Philyaw] or any of those things he had told you.

"A. Well, a couple of things. One is that Tim was -- you know, you're probably -- [you Rule-32 counsel are] dealing with a much older and probably more matured person. We were dealing with an out-of-control teenage boy who thought he was a celebrity and a hero and was going to take the hit for everybody, and we had no idea what he would do if he got to the witness stand.

The other -- the other problem was that even if he told us what he had said to us, he still would be basically admitting to capital murder because he said he hit

> [Philyaw] in the head with a pipe or something to that effect. You know, he may not have been the fatal blow, but it would certainly -- there wouldn't be any way that his testimony would be exculpatory. It might minimize -- you might be able to minimize what he did, but not clear him."

(32C. 11657-658, 11678.)

Counsel had strategic reasons not to present Flowers's testimony. Flowers failed to meet his burden to overcome those strategic reasons. Therefore, the circuit court did not abuse its discretion by holding that counsel's performance was not deficient under Strickland.

Finally, Flowers did not, and cannot, show that there is a reasonable probability that, had counsel presented more evidence relating to the forensics of the crime scene and/or presented Flowers's testimony, the outcome of the trial would have been different. See Harrington, 562 U.S. at 112; Strickland, 466 U.S. at 693. As discussed above, defense counsel attacked the State's theory of the case by establishing -- through the State's witnesses -- that there were too few shotgun pellets in the truck, there were no holes in the truck, and there were no indentations from pellets in the truck. Presenting additional evidence to prove those readily understandable facts would not have changed the outcome of the case. Further, presenting Flowers's testimony would, as the circuit court found, have likely been harmful. The State would have impeached him with his confessions and his admission to his sister. Further, he would have had to admit that he hit Philyaw in the head with a pipe indicating that Flowers intended for Philyaw to die. Finally, there was overwhelming evidence establishing that Flowers intended to kill Philyaw.[2] See Lee v. State, 44 So. 3d 1145, 1159 (Ala.

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[2]The jury acquitted Flowers of murder made capital because the "[m]urder [was] committed by or through the use of a deadly weapon while the victim [was] in a vehicle." § 13A-5-40)(a)(17), Ala. Code 1975. Flowers asserts that the jury's acquittal establishes that the jury doubted that he was the shooter or intended that Philyaw be killed. No such inference

Crim. App. 2009) (holding that the petitioner failed to prove prejudice under Strickland because the evidence of his guilt was overwhelming); see also Buehl v. Vaughn, 166 F.3d 163, 172 (3d Cir. 1999) ("It is firmly established that a court must consider the strength of the evidence in deciding whether the Strickland prejudice prong has been satisfied."); Reed v. Norris, 195 F.3d 1004, 1006 (8th Cir. 1999) ("We find it unnecessary to discuss the reasonableness of counsel's conduct because, given the overwhelming evidence of [defendant's] guilt presented at trial, we find that it would be impossible for him to demonstrate prejudice under Strickland."); United

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can be drawn. One of the issues litigated at trial was whether the bed of a pickup truck constituted the inside of a vehicle. The jury could have simply determined that it was not. Flowers also asserts that "[t]he jury acquitted Mr. Flowers of all three murder conspiracy counts with which he had been charged, establishing that Mr. Flowers had agreed only to participate in a robbery of Philyaw and had not entered into any agreement to kill Philyaw." (Flowers brief, at 80.) Again, Flowers has drawn a false inference, has misconstrued the law in Alabama, and has overlooked the trial record in this case. Section 13A-4-5(b)(3), Ala. Code (1975), provides that a criminal defendant "may not be convicted on the basis of the same course of conduct of both the actual commission of the offense and: [c]riminal conspiracy of the offense." See also Williams v. State, 830 So. 2d 45, 48 (Ala. Crim. App. 2001) ("Section 13A-4-5(b)(3) merges the inchoate offense into the conviction for the substantive offense to the extent that it bans a double conviction for both the substantive offense and a conspiracy to commit that offense."). At trial, the prosecutor informed the jury and the circuit court instructed the jury that, if it found Flowers guilty of the capital offenses, it could not also find him guilty of the conspiracy to commit those capital offenses. The jury found Flowers guilty of committing murder made capital because it was committed during the course of a kidnapping and during the course of a robbery. Following the circuit court's instructions, the jury was required to acquit Flowers of the charges that he conspired to commit those capital offenses.

States v. Royal, 972 F.2d 643, 651 (5th Cir. 1992) ("The overwhelming evidence of Defendant's guilt further supports our conclusion that he suffered no prejudice as a result of his counsel's performance."). Consequently, Flowers failed to prove that counsel's performance was prejudicial under Strickland.[3]

II.

The State appeals the circuit court's decision holding Flowers's counsel were constitutionally ineffective for their penalty-phase performance. Specifically, the State argues that the Rule 32 court abused its discretion by holding that Flowers's counsel were ineffective during the penalty phase for: a) failing to conduct an adequate mitigation investigation; b) failing to call lay witnesses; c) failing to adequately present evidence of brain damage and cognitive issues; d) mishandling their mental-health expert, Dr. John Goff, and for failing to retain a social worker and a neurologist; and e) failing to adequately present evidence indicating that Flowers would not be a danger if sentenced to life in prison without the possibility of parole. For the reasons that follow, this Court affirms the circuit court's decision holding Flowers's counsel ineffective during the penalty phase of his trial.

> "When reviewing claims of ineffective assistance of counsel during the penalty phase of a capital trial we apply the following legal standards.
>
> > "'When the ineffective assistance claim relates to the sentencing phase of the trial, the standard is whether there is "a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence --

[3]Flowers raised in his Rule 32 petitions numerous other claims relating to the guilt phase. He, however, reasserts only one on appeal. The claims Flowers fails to reassert on appeal have been abandoned. Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

> would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland [v. Washington], 466 U.S. [668,] at 695, 104 S. Ct. [2052,] at 2069 [(1984)].'

Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir. 1994).

"In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L. Ed. 2d 471 (2003), the United States Supreme Court in reviewing a claim of ineffective assistance of counsel at the penalty phase of a capital trial, stated:

> "'In Strickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.'

"539 U.S. at 534, 123 S. Ct. 2527.

> "'The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information supplied by the defendant. E.g. Commonwealth v. Uderra, 550 Pa. 389, 706 A.2d 334, 340-41 (1998) (collecting cases). Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel.'"

Waldrop v. State, 987 So.2d 1186, 1195 (Ala. Crim. App. 2007), quoting Commonwealth v. Bond, 572 Pa. 588, 609-10, 819 A.2d 33, 45-46 (2002).

> "'"A defense attorney is not required to investigate all leads, however, and 'there is no per se rule that evidence of a criminal defendant's troubled childhood must always be presented as mitigating evidence in the penalty phase of a capital case.'" Bolender [v. Singletary], 16 F.3d [1547,] 1557 [(11th Cir. 1994)] (footnote omitted) (quoting Devier v. Zant, 3 F.3d 1445, 1453 (11th Cir. 1993), cert. denied, [513] U.S. [1161], 115 S. Ct. 1125, 130 L.Ed.2d 1087 (1995)). "Indeed, '[c]ounsel has no absolute duty to present mitigating character evidence at all, and trial counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel.'" Bolender, 16 F.3d at 1557 (citations omitted).'
>
> "Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995).

Davis v. State, 44 So. 3d 1118, 1137-38 (Ala. Crim. App. 2009).

> "'Although failure to present mitigating evidence during the penalty phase is not per se ineffective assistance of counsel, counsel has a duty to make a reasonable investigation of defendant's case or to make a reasonable decision that a particular investigation is unnecessary. Ransom v. Johnson, 126 F.3d 716, 723 (5th Cir. 1997).... If trial counsel's investigation was unreasonable then making a fully informed decision with respect to sentencing strategy was impossible. Wiggins, 539 U.S. at 527-28, 123 S. Ct. 2527.'"

Whitehead v. State, 955 So. 2d 448, 464 (Ala. Crim. App. 2006) (quoting Smith v. Dretke, 422 F.3d 269, 283-84 (5th Cir. 2005). Stated differently,

> "'"'An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.' Porter v. Singletary, 14 F.3d 554, 557 (11th Cir.), cert. denied, 513 U.S. 1009, 115 S. Ct. 532, 130 L. Ed. 2d 435 (1994). The failure to do so 'may render counsel's assistance ineffective.' Bolender [v. Singletary], 16 F.3d [1547] 1557 [(11th Cir. 1994)].'"

Whitehead v. State, 955 So. 2d at 464 (quoting Harris v. State, 947 So. 2d 1079, 1113-15 (Ala. Crim. App. 2004), quoting in turn Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995)).

Regarding Flowers's claims that counsel were ineffective in the penalty phase, the circuit court, in a detailed order, held:

> "It is the opinion of the Court that Mr. Flowers'[s] court appointed trial counsel rendered ineffective assistance during the penalty phase of his trial. On January 16, 2001, Mr. Flowers was indicted by a grand jury. Earlier that month, attorneys William Pfeifer and Hallie Dixon were appointed to represent Mr. Flowers. Mr. Pfeifer was a solo practitioner with seven years experience at the time. He had previously tried one capital case prior to Mr. Flowers'[s] trial. Ms. Dixon, appointed to assist Mr. Pfeifer, had no prior capital case experience.
>
> "From the time they were retained in early January 2001 until January 22, 2002, a date less than two weeks before the start of the trial, trial counsel spoke to only three potential mitigation witnesses other than Mr. Flowers -- his sister, his father, and his cousin. Trial counsel only spoke to

three potential witnesses despite the fact that they had been given the names and contact information for numerous family members, friends, and teachers of Mr. Flowers who could provide mitigating evidence and even though trial counsel had obtained funds from the trial court to obtain the assistance of a mitigation investigator. Because Mr. Flowers'[s] trial counsel failed to adequately investigate, develop, and present the case for life on Mr. Flowers'[s] behalf, the Court did not hear from numerous witnesses or see a great deal of documentary evidence bearing directly upon Mr. Flowers'[s] moral culpability.

"Mr. Flowers'[s] trial counsel inexplicably waited several months to secure funding for their hired investigator, Aaron McCall, and then failed to supervise him or provide adequate instructions. Mr. McCall spent less than 50 hours on an investigation, which typically takes three to six times that long. Mr. McCall gave trial counsel a fraction of available records and identified only one family member, friend, teacher, or colleague to testify on Mr. Flowers'[s] behalf. As a result, trial counsel failed to discover and failed to present a litany of potential witnesses who would have testified that Mr. Flowers is a fundamentally good person who suffers from permanent neurological disabilities due to, among other injuries, his mother's systemic alcohol abuse while pregnant.

"Trial counsel's performance in preparing for and presenting a mitigation case was objectively unreasonable from the beginning of their pre-trial investigation to Mr. Flowers'[s] sentencing. Mr. Flowers suffered prejudice in that he was sentenced to death by a judge and jury who heard virtually none of the most crucial mitigating facts in his case regarding Mr. Flowers'[s] brain damage and other cognitive issues."

(C. 1300-01.) The circuit court then addressed a number of Flowers's specific claims and held that counsel were ineffective.

A.

Regarding Flowers's claim that trial counsel were ineffective for delegating their entire mitigation investigation to a hired specialist without supervising that specialist, the circuit court held:

> "Trial counsel provided ineffective assistance by conducting virtually no investigation or search for mitigating evidence. In the year between the time they first committed to work on the case and January 22, 2002 -- less than two weeks before trial -- the entire mitigation investigation conducted by Mr. Flowers'[s] attorneys consisted of one brief telephone call (with Mr. Flowers'[s] father) and interviews with three others (Mr. Flowers, his sister Teresa, and his cousin Alisa Rolin). See Pfeifer Dep. (Pet. Ex. 867) at 51:5-52:18. Instead of searching for mitigating evidence themselves, trial counsel retained an investigator named Aaron McCall to serve as a mitigation specialist. Mr. McCall testified that '[a] mitigation specialist is someone who compile[s] a social history of the defendant, looking specifically for any factors that could impact or mitigate a crime that a defendant has been charged with.' Testimony of A. McCall, Transcript of Rule 32 Hearing (Aug. 5-6, 2013) at 8:3-6. Thus, Mr. McCall's assigned duties included identifying, seeking out, and interviewing potential witnesses and obtaining documents relating to Mr. Flowers'[s] social and developmental history. See A. McCall Affidavit in Support of Defendant's Application for Investigative Expenses at ¶ 5 (affidavit executed on Jan. 25, 2001) (Pet. Ex. 21). Unfortunately, trial counsel failed to supervise Mr. McCall and Mr. McCall, at least partially because of the lack of supervision and communication from trial counsel, failed to perform an adequate investigation.
>
> "Because Mr. McCall acted on behalf of and as an agent for trial counsel, his acts and omissions, as well as the inadequacy of his investigation, are directly attributable to counsel themselves for

constitutional purposes. See Restatement (Second) of Agency § 12 (1958). Counsel cannot delegate away their Sixth Amendment responsibility to conduct an adequate investigation. Stubbs v, Thomas, 590 F. Supp. 94, 100 (S.D.N.Y. 1984) (holding that the right to effective assistance of counsel 'may not be defeated by delegating investigative duties to someone other than counsel'); see also Williams v. State, 783 So. 2d 108, 128 (Ala. Crim. App. 2000). As a result, the person conducting the investigation also has a duty to render reasonably effective assistance. Stubbs, 590 F. Supp. at 100 (holding investigator to Sixth Amendment standard of effective assistance). In addition, counsel have a duty to supervise any person they hire to assist them in their investigation and to review and, if necessary, correct the decisions and judgments made by their agents in conducting the mitigation investigation. Id. Any breach of these duties constitutes a violation of the Sixth Amendment guarantee of effective penalty-phase assistance of counsel. Id.

"With these obligations in mind, Mr. Pfeifer signed a memorandum of agreement at the time of Mr. McCall's retention stating as follows:

> "I understand that The Alabama Prison Project, Mitigation Program and agents or representatives thereof are not responsible for the outcome of the client's case. The Mitigation Investigator will be under my direct supervision and case management decisions will remain in my authority.

"Pet Ex. 251 at APP-0413.

"Despite trial counsel's constitutional and express contractual obligations, they failed to supervise Mr. McCall and failed to ensure that an adequate mitigation investigation took place. See Trial Counsel's Ex Parte Application for Investigative Expenses (Apr. 23, 2001) (Pet. Ex. 22) at 16 (acknowledging that '[a]t the heart of

effective representation is the independent duty to investigate and prepare') (quoting Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)). The perfunctory investigation conducted by Mr. McCall (and nominally by trial counsel) was inadequate for several reasons.

"....

"... Mr. McCall did not begin his mitigation investigation until May 10, 2001, when he met with Mr. Flowers for the first time. See A. McCall's Mitigation Invoice (attached to Pet. Ex. 169, W. Pfeifer's Attorney's Fee Declaration). By then, almost four months had elapsed since trial counsel were appointed and Mr. Pfeifer and Mr. McCall had signed the memorandum of agreement outlining Mr. McCall's responsibilities.

"In the nine months that Mr. McCall worked on the case before trial, he spent only 47.5 hours on the investigation he was hired to conduct. Id. By Mr. McCalls own estimate, 'conducting an adequate mitigation investigation [in a capital case] requires between 150 and 300 hours per case and an expertise quite different in scope from that of most defense attorneys.' A. McCall Affidavit in Support of Defendants Application for Investigative Expenses at ¶ 11 (Pet. Ex. 21). Mr. McCall testified that this estimate comes from the National Legal Aid Assistance and Defense Foundation, and that 'in order to do an adequate preparation for a mitigation case or an investigation and to inform future and additional experts, it will take this kind of time.' Testimony of A, McCall, Rule 32 Hearing Tr. (Aug, 5-6, 2013) at 12:1-17. Yet, Mr. McCall spent at most one-third and as little as one-sixth that amount of time on Mr. Flowers'[s] mitigation investigation.

"Trial counsel agreed that 150 to 300 hours is a reasonable amount of time to spend on a typical mitigation investigation. See Pfeifer Dep. (Pet. Ex. 867) at 49:1-5-:6. Mr. Pfeifer testified that

he believed Mr. McCall would 'be trying to work within that range,' and that he was 'surprise[d]' to later discover Mr. McCall had done so little work because 'he had the impression [Mr. McCall] was putting time into the case.' Id.

"Yet according to Mr. McCall's billing invoice, virtually all of his work took place between May and September 2001. See A. McCall's Mitigation Invoice (attached to Pet. Ex. 169, W. Pfeifer's Attorney's Fee Declaration). On September 13, 2001, Mr. McCall sent a letter to trial counsel 'identifying [six potential] mitigation issues for further develop[ment] and presentation at trial':

> "1. Timothy's age at the time of the crime presents some significant issues of cognitive development and competency to waive his Miranda rights.
>
> "2. Timothy has a history of behavioral problems and depression and may also have a learning disability.
>
> "3. Timothy has a long history of alcohol and drug abuse.
>
> "4. Timothy may be suffering from brain damage or some other neuropsychological impairment due to an automobile accident where he sustained some sever[e] head injuries that resulted in seizures and severe headaches since he was a small child.
>
> "5. The affects of alcoholic parents and the dysfunctional family environment in which Timothy grew up.
>
> "6. The [e]ffects of Zolof[t] on a manic personality, Timothy reports that immediately after being placed on Zolof[t] he underwent personality changes and lost a period of time

> during which, he was told, he had become violent. He has no, or at most, only vague memory of these events.

"Letter from A. McCall to W. Pfeifer and H. Dixon (Sep. 13, 2001) at 1-2 (Pet. Ex. 118).

"Mr. McCall advised trial counsel that 'in order to develop the above we would need to seek funding for [at least two] experts in the fields of inquiry.' Id. at 2. Mr. McCall recommended Dr. John Goff, Ph.D., a clinical and neuropsychologist, and Dr. Karen L. Salekin, Ph.D., a clinical and forensic psychologist with 'considerable work in the area of evaluations of delinquency, competency to stand trial ..., treatment needs, abuse/neglect, and capacity to parent.' Id. at 2. Mr. McCall further advised trial counsel that 'you should immediately subpoena all the DHR records pertaining to the Flowers[] family' because they may 'provide some great insight into the dynamics of the family,' particularly Mr. Flowers'[s] foster care. Id. at 2.

"Finally, Mr. McCall informed trial counsel that medical and school records had 'just begun to come in.' Id. at 2. Mr. McCall added that he had 'not had time enough to review and evaluate all of them but the ones I have had the time to peruse [don't] show anything too remarkable but do confirm some things that Timothy told me in his initial interview.' Id. at 2. Mr. McCall concluded, 'at this point I don't see how we can be ready for trial by the end of October [as was initially scheduled]. Even if the judge approve[s] funding for the assistance of these experts, they will still need time to conduct their tests and prepare for trial.' Id. at 2.

"After sending this report in mid-September 2001, however, Mr. McCall spent no time on Mr. Flowers'[s] case until January 14, 2002, when he eventually met with Ms. Dixon shortly before trial. See A. McCall's Mitigation invoice (attached to Pet.

Ex. 169, W. Pfeifer's Attorney's Fee Declaration); Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 13:12-24 (stating that he (Mr. McCall) did 'the very best he could' to record all of his time on this invoice, and he can't think of any work he left off of the invoice). In the four months between September and January, the record does not reflect that anyone -- neither trial counsel nor Mr. McCall -- conducted any significant work on Mr. Flowers'[s] mitigation case.

"Mr. McCall claimed he stopped working on the case in September 2001 because he believed '[his] role ... as far as investigation was concerned ... was over ... because we were ready to go to trial.' Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 28:23¬29:4. But Mr. McCall's own words in September 2001 contradict this claim. In his letter, Mr. McCall informed counsel 'at this point I don't see how we can be ready for trial by the end of October [as scheduled at that time].' Letter from A. McCall to W. Pfeifer and H. Dixon (Sep. 13, 2001) at 1-2 (Pet. Ex. 118). This belies Mr. McCall's hindsight justification that he believed the defense was 'ready to go to trial' at that time.

"Mr. McCall further testified that he 'expected the trial lawyers [would] interview ... all the people [Mr. McCall] knew about that he had not [already] talked to' at that point. Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 29:5-9. Mr. McCall offered no convincing explanation as to why he thought his work on Mr. Flowers'[s] case ended in September 2001, or why he expected trial counsel to finish the work he had been hired to do.

"The lack of investigation conducted by Mr. McCall came to light in late January 2002, barely two weeks before trial, when Mr. Pfeifer sent a frantic e-mail to Mr. McCall requesting his work product:

> "Hey Aaron: Two weeks to the Flowers trial!! I need to have a list of the names and addresses of the people to subpoena to court to testify for Tim. I am meeting with Johnny Abrams tomorrow, but I need to know the other people you have talked to that we can use. Also, I need whatever information you want me to know about Tim for mitigation. If you can get all of this information to me ASAP, I would really appreciate it."

"E-mail from W. Pfeifer to A. McCall (Jan. 21, 2002) (Pet. Ex. 77).

"Mr. McCall responded the next day and said 'I will have the social history to you later today. The only person that I will want to call as a witness other than Dr. Goff will be Teresa, his sister. I have not developed any other witness that could be of any help to us.' E-mail from A. McCall to W. Pfeifer (Jan. 22, 2002) (Pet. Ex, 77).

"Thus, notwithstanding the six specific areas Mr. McCall identified for follow-up investigation in September 2001, by January 2002 -- almost a year after McCall was retained -- he had identified only one lay witness to provide any helpful testimony for Mr. Flowers'[s] mitigation case. Moreover, Mr. McCall provided trial counsel very little documentary evidence relating to any of these issues. ...

"...

"[T]rial counsel were understandably shocked at Mr. McCall's response to counsel's request for mitigation evidence:

> "Q: What was your reaction to [Mr. McCall's e-mail on January 22, 2002|?

"A: I don't ... recall exactly, but I'm sure I was unhappy because ... you know, in looking at it, I can see that sentence is carefully worded there. It's where he's saying 'I have not developed any other witness,' ... perhaps more accurately was that he hasn't talked to any other witnesses.... Either way, it was not helpful. I mean, at that point Aaron's basically done almost nothing for us by not providing us any of this.

"Q: ... And you had known for a year that there were very fruitful mitigation issues around Mr. Flowers and his upbringing and his background ,..

"A: Right.

"Q: And so is it fair to say you were expecting a much more fulsome mitigation presentation from Mr. McCall?

"A: Yes.

"Pfeifer Dep. (Pet. Ex. 867) at 178:21-179:18.

"Mr. McCall's failure to investigate was particularly detrimental to Mr. Flowers'[s] mitigation defense because trial counsel had conducted virtually no background investigation themselves, based on their mistaken assumption that Mr. McCall would do so and would provide a 'fulsome mitigation presentation,' as they had agreed. See Pfeifer Dep. (Pet. Ex. 867) at 51:5-52; 18, 179:15-18. When trial counsel discovered on January 22 that Mr. McCall had 'done almost nothing for us' and would 'not provid[e] us any of this,' they were left with barely two weeks before trial to attempt

to piece together a mitigation case. Id. at 178:21-179:-7. As a result, trial counsel ended up presenting a weak and incomplete mitigation defense.

"Even Mr. McCall concedes that, with the benefit of hindsight, Mr. Flowers did not receive an effective mitigation defense because Mr. McCall and trial counsel failed to adequately 'present [Mr. Flowers] in a totality,' as opposed to merely 'in light of a crime or one incident' -- as is the goal in every mitigation case:

"Q: In your judgment, was that done here?

"A: In hindsight, in all honesty, even now looking back and judging the role that I played in it, no, that wasn't done.

"Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 35:9-19."

(C. 1301-12.) The circuit court then found that McCall's failure to develop mitigation witnesses and failure to collect documentary evidence that could be presented in mitigation was attributable to trial counsel. See Chatman v. Walker, 297 Ga. 191, 202, 773 S.E.2d 192, 200 (2015) (finding trial counsel ineffective, in part, for failing to supervise the mitigation specialist they hired). Specifically, the circuit court found that trial counsel failed to supervise McCall and, as a result, were unaware until two weeks before trial that McCall had developed only two witnesses, Dr. Goff and Flowers's sister, and collected very little documentary evidence.

The circuit court's findings are supported by the record. Evidence presented at the Rule 32 hearing indicated that counsel hired McCall as a mitigation expert. After hiring McCall, counsel performed almost no mitigation investigation. Rather, counsel relied upon McCall to collect evidence relating to mitigation, to contact and interview witnesses, and to suggest mitigation experts. McCall, however, spent less than 50 hours investigating mitigation in preparation for trial. As a result of McCall's failure to thoroughly investigate mitigation, he developed only two witnesses for

counsel to use at trial.[4] Counsel were unaware of and failed to remedy McCall's lack of effort because counsel themselves had failed to supervise and monitor McCall's progress. Consequently, two weeks before trial, counsel were blind-sided by McCall's inability to produce mitigating evidence. Consequently, this Court cannot say that the circuit court abused its discretion by finding that defense's mitigation investigation was constitutionally deficient.

B.

Regarding Flowers's claim that trial counsel were ineffective for failing to discover and to present testimony from numerous lay witnesses, the circuit court held:

> "Because of trial counsel's and Mr. McCall's failure to conduct an adequate pre-trial investigation, they did not identify, interview, or properly prepare crucial witnesses to testify in Mr. Flowers'[s] defense. A host of friends, family members, teachers, and other acquaintances were willing and able to provide compelling testimony on Mr. Flowers'[s] behalf. Collectively, these witnesses would have testified that Mr. Flowers was a fundamentally good person who grew up in an abusive, unstable, and impoverished household and suffered from a litany of psychological and neurological issues likely caused by, among other things, pre-natal alcohol exposure due to his mother's binge drinking. ... Such evidence would have been highly relevant to Mr. Flowers'[s] mitigation defense. But trial counsel and Mr. McCall barely spoke to the vast majority of these potential witnesses, if at all, nor called them to testify. See Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1351 (llth Cir. 2011) (holding ineffective assistance where, '[u]nder the prevailing standards [at the time of trial] ...

[4]A document titled Confidential Attorney Work Product identifies 7 potential mitigation witnesses, however, McCall informed counsel that he had developed only two witnesses for trial.

[defendant's] attorneys did not conduct an adequate background investigation and unreasonably decided to end the background investigation after only talking to [the defendant, one family member, and one doctor]').

> "1. Trial counsel failed to investigate or present mitigation witnesses identified by Mr. Flowers and his family.

"At the penalty phase of Mr. Flowers'[s] trial and at his sentencing hearing, the judge and jury heard from only three witnesses who knew Mr. Flowers personally; a former friend named Steven Knowles, a former employer named Johnny Abrams, and Mr. Flowers'[s] sister, Teresa Coleman.[5] This sparse testimony, though better than nothing, fell far short of painting an adequate picture of Mr. Flowers'[s] humanity. The witnesses who testified barely scratched the surface of Mr. Flowers'[s] brain damage, cognitive deficits, extremely difficult family life, and other mitigating factors.

"Trial counsel called one expert witness, a neuropsychologist named Dr. John Goff, to testify at the penalty phase. However, as explained below, Dr. Goff admits he was unable to provide a reliable assessment of Mr. Flowers'[s] condition because, like the judge and the jury, he never heard important underlying factual evidence which trial counsel failed to present. ...

"According to Johnny Abrams, Mr. Flowers'[s] former employer, trial counsel 'did nothing to prepare [him] for [his] testimony in the penalty phase of Timothy's trial' and 'did not run through questions and answers in advance,' even though Mr. Abrams had asked trial counsel for a list of

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[5]At Flowers's insistence, Coleman did not testify during the penalty phase before the jury. She did, however, testify during the judicial-sentencing phase.

possible questions. Affidavit of Johnny Abrams ¶ 15 (Oct. 24, 2012) (Pet Ex. 596). In fact, it was due to Mr. Abrams'[s] efforts, not trial counsel's, that he testified at all. Mr. Abrams took it upon himself to contact Mr. Flowers'[s] attorneys and volunteer his services shortly before trial. See Deposition of William Pfeifer, Jr. (May 7, 2013) at 51:19-52:18. Prior to Mr. Abrams proactively reaching out to trial counsel, neither trial counsel nor their investigator made any effort to identify, locate, or interview Mr. Abrams. Id.

"On his own accord, Mr. Abrams gave trial counsel and their investigator a list of eleven 'people who knew Timothy well and who, to [Mr. Abrams'] knowledge, also believed that Timothy is not the kind of person to be involved in an offense like this on his own.' Id. at ¶ 13 and Ex. B. The list Mr. Abrams provided included identifying information and [tele]phone numbers for many of these individuals. Id. Mr. Abrams reported that he 'talked to many of these people and asked them to contact Timothy's lawyers and to testify on behalf of Timothy,' even going so far as to 'bring[] some of the people on the list to the courthouse on [his] own to meet the defense team." Id. at 13.

"Unfortunately, Mr. Abrams'[s] efforts went largely to waste. Of the eleven potential witnesses Mr. Abrams identified, trial counsel called only one to testify on Mr. Flowers'[s] behalf: Steven Knowles, a former friend who had not spoken with Mr. Flowers for over two years. Mr. McCall, the mitigation investigator, received Mr. Abrams'[s] list but never spoke with anyone on it except for Mr. Flowers'[s] father. See Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 41:15-42:9. Mr. Pfeifer similarly testified that he does not recall interviewing or even meeting with any of the individuals Mr. Abrams identified, except for Mr. Knowles and Mr. Flowers'[s] father, although trial counsel might have briefly 'talked to' Mr. Flowers'[s] friend Chris Boatwright and his uncle Mack Harrelson at the courthouse with the trial

already in progress. See Pfeifer Dep. (Pet. Ex. 867) at 182:17-183:5. Nor does Mr. Pfeifer have any recollection 'why none of these other folks were called' to testify. Id. at 185:19-8 ("I don't remember if it was that they didn't have anything valuable to say or if it was that there were things they would say that we didn't like or what. But for whatever reason ... I apologize that there's no record of that."). ...

"Trial counsel failed to prepare Mr. Abrams to testify and failed to investigate the information he provided in large part because Mr. McCall did not speak with Mr. Abrams for the first time until a week before trial. Mr. Pfeifer testified:

> "Q: And [Mr. McCall] said [Mr. Abrams] will make an excellent mitigation witness. Right?
>
> "A: Right.
>
> "Q: And this is someone McCall is just now talking to a week before trial. Right?
>
> "A: Right.
>
> "Q: [Mr. McCall] says [Mr. Abrams] can provide a wealth of information about the dysfunction of [Timothy's] family?
>
> "A: Right.
>
> "Q: Given the fact that Mr. Abrams is being presented so late, do you feel like [you] had an adequate opportunity to develop all the information that Mr. Abrams could provide?
>
> "A: No.

"Pfeiter Dep. (Pet. Ex. 867) at 191:1-16.

"Thus, despite Mr. Abrams'[s] effort to assist Mr. Flowers, trial counsel's failure to conduct a proper pretrial investigation and to timely interview Mr. Abrams prevented them from acting on the information Mr. Abrams volunteered. Along similar lines, Mr. Pfeifer testified that he could not recall any strategic reason why various other witnesses with relevant information were not called to testify:

> "• Mr. Pfeifer does not recall why Mr. Flowers'[s] friend Donnie Blackmon didn't testify; trial counsel never interviewed Mr. Blackmon and Mr. McCall 'apparently didn't talk to [Mr. Blackmon] himself.' Pfeifer Dep. (Pet. Ex. 867) 191:24-192:1 and 195:15-18.
>
> "• Mr. Flowers'[s] uncle and temporary foster parent, Mack Harrelson, wasn't called to testify because Mr. Flowers'[s] sister 'told us not to put him on the stand,' but neither trial counsel nor Mr. McCall interviewed or evaluated Mr. Harrelson. Id. at 192:2-15.
>
> "• Neither trial counsel nor Mr. McCall even spoke with Rebecca Boutwell, the mother of Mr. Flowers'[s] child, and Mr. Pfeifer does not remember why she was not called to testify. Id. at 194:14-23.

"Trial counsel similarly disregarded other potential witnesses identified by Mr. Flowers'[s] sister, Teresa, and by Mr. Flowers himself See, e.g., Handwritten Notes from May 10, 2011 Meeting with Trial Counsel, Mitigation Investigator, and Defendant (Pet. Ex. 65) at WP001182-83 (listing Johnny Abrams, four teachers, and fives friends identified by Mr. Flowers as potential witnesses, with phone numbers for all five friends). Trial counsel and Mr. McCall knew about these individuals

as early as May 2001, as much as nine months before trial. See Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 21:5-24:18. Still, neither trial counsel nor Mr. McCall made any effort to seek them out or interview them:

> "Q: And the fact of the matter is you never talked to any of these people, did you?
>
> "A: That's correct.
>
> "Q: As far as you know, the trial lawyers never talked to any of these people?
>
> "A: Not to my knowledge.

"Id. at 24:19-24.

"Trial counsel would have discovered many, if not all, of these witnesses independently if they had performed an adequate investigation. But the fact that Mr. Flowers and his family brought many of these witnesses to trial counsel's attention makes counsel's failure to present or at the very least interview them even more problematic. See Debruce v. Comm'r, Ala Dep't of Corrections, 758 F.3d 1263, 1274 (11th Cir. 2014) (holding ineffective assistance of counsel where trial counsel decided 'not to follow up on [relevant mitigation] information'). 'Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation.' Id. at 1275 (quoting Wiggins, 539 U.S. at 533). Where, as here, 'there is no indication that [trial counsel's failure to develop the troubling leads ... was supported by a professional judgment not to pursue a mitigation investigation,' trial counsel's performance is objectively unreasonable and constitutes ineffective assistance of counsel. Id. See also Cooper v. Secretary, Dep't. of Corrections, 646 F.3d at 1352 (holding ineffective assistance where trial counsel 'never contacted [four potential

witnesses about testifying on [defendant's] behalf,' and where, as here, they overlooked witnesses [who] 'testified they... would have testified had they been asked').

"2. Trial counsel failed to locate or present testimony of key potential mitigation witnesses.

"Mr. Flowers contends that his counsel was ineffective for failing to call his older sister, Ms. Teresa Coleman, at the penalty phase of his trial. The record shows that trial counsel had planned on relying heavily on the testimony of Ms. Coleman during the penalty phase of the trial, viewing her as their key mitigation [witness]. However, soon before Ms. Coleman was scheduled to give penalty-phase testimony, Mr. Flowers informed his attorneys that he did not wish Ms. Coleman to be called. Mr. Flowers, against the advice of trial counsel, insisted on preventing Ms. Coleman from testifying.

"The Court finds that it was not ineffective assistance of counsel to follow Mr. Flowers'[s] wishes. See Adkins v. State, 930 So. 2d 524, 538 (Ala. Crim. App. 2001) (internal quotations omitted) (Stating when a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision; and further noting that if the defendant is prejudiced in some respect by his own decision, he should not later be heard to complain about those consequences by challenging the conduct of his counsel). Although Mr. Flowers'[s] trial counsel were not ineffective in failing to call Ms. Coleman, they were nevertheless obligated to put on an adequate mitigation case.

"By trial counsel's own admission, they improperly deferred to Mr. Flowers'[s] irrational views on strategic decisions that should have been guided by counsel. Id. at 214:4-17. In hindsight, Mr. Pfeifer testified that Mr. Flowers'[s] judgment

should not have been 'given any deference, because he obviously had very bad judgment.' Id. at 215:1-8. This is borne out by the facts of this case at every level. Accordingly, Mr. Pfeifer 'sometimes ... wonder[sl if [he] shouldn't have called [Teresa to testify at the penalty phase] anyway,' despite Mr. Flowers'[s] initial objections:

> "Q: Because you knew it was a mistake not to call her. Right?
>
> "A: Yes. Huge mistake ... I don't think any sane person could say it was not a mistake ... for Teresa not to take the stand ... I think we thought Teresa was the perfect witness for that job [to testify about Mr. Flowers'[s] life or the value of his life], and obviously we should have had a backup plan.

"Id. at 215:8-20 and 216:6-10, 217:12-25.

"But trial counsel had no backup plan because they failed to conduct an adequate investigation. All in all, trial counsel and Mr. McCall ignored or disregarded at least seventeen friends, family members, teachers, and a treating physician who would have provided helpful testimony as to Mr. Flowers'[s] personalty, character, and mental disabilities if they had been asked to do so. 'Background and character evidence is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse.' Cooper, 646 F.3d at 1354 (internal quotation marks omitted). Years after Mr. Flowers'[s] trial, his Rule 32 counsel were able to obtain detailed affidavits from the following individuals showing droves of potential testimony that strongly supports Mr. Flowers'[s] mitigation defense and should have been presented at trial:

"• Donnie Blackmon, a friend of Mr. Flowers, who personally observed seizures suffered by Mr. Flowers. According to Mr. Blackmon, one of Mr. Flowers'[s] attorneys briefly contacted him prior to trial but never asked him about Mr. Flowers'[s] background, family, or medical history, and never followed up with him after a brief initial phone call. See Affidavit of Donnie Blackmon (Pet Ex. 582).

"• Hazel Mitchell, Mr. Flowers'[s] aunt, who had personal knowledge of seizure disorders running in Mr. Flowers'[s] family. Ms. Mitchell was never contacted by Mr. Flowers'[s] attorneys. See Affidavit of Hazel Mitchell (Pet. Ex. 583).

"• Christopher Boatwright, Mr. Flowers'[s] cousin, who witnessed Mr. Flowers'[s] seizures as a child. Mr. Boatwright spoke briefly with Mr. Flowers'[s] attorneys before trial but they did not ask him about Mr. Flowers'[s] seizures, background, or family life. See Affidavit of Christopher Boatwright (Pet Ex. 585).

"• Stephanie Flowers, the wife of one of Mr. Flowers'[s] cousins, who had personal knowledge of seizure disorders running in Mr. Flowers'[s] family. Ms. Flowers was never contacted by Mr. Flowers'[s] attorneys. See Affidavit of Stephanie Flowers (Pet Ex. 586).

"• Susan Morgan, one of Mr. Flowers'[s] teachers, who would have testified that Mr. Flowers was a 'shy and polite boy' whose parents neglected him and

who was often ostracized because of his family's abject poverty. Ms. Morgan would have further testified that Mr. Flowers would not pose a danger to himself or others if sentenced to life in prison. However, trial counsel never contacted Ms. Morgan. See Affidavit of Susan Morgan (Pet. Ex. 590).

"• Paula Jernigan, one of Mr. Flowers'[s] teachers, who would have offered detailed testimony as to specific cognitive deficits or disabilities she personally observed in Mr. Flowers. Ms. Jernigan would have further testified that Mr. Flowers 'wanted to be a good kid' and 'wanted to succeed and do what was right,' but that Mr. Flowers was 'unable to overcome the effects of his home environment, innate deficits, and lack of consistent medication,' and that Mr. Flowers would probably function well in prison. See Affidavit of Paula Jernigan (Pet. Ex. 591).

"• Pamela Mathis, one of Mr. Flowers'[s] teachers, who would have provided additional testimony similar to Ms. Jernigan's. Ms. Mathis would have further testified that Mr. Flowers 'was a good kid at heart,' 'kind, loving, and generous," and was 'devastated when his mom died.' See Affidavit of Pamela Mathis (Pet. Ex. 592).

"• Alisa Rolin, the daughter of one of Mr. Flowers'[s] cousins, who personally observed Mr. Flowers'[s] parents' alcoholism and Mr. Flowers'[s] neglectful, impoverished childhood. Ms. Rolin would have

further testified that Mr. Flowers 'was not aggressive or violent' and 'could not stand the sight of blood.' See Affidavit of Alisa Rolin (Pet. Ex. 593).

"• Joe Ann Boutwell, the mother of Mr. Flowers'[s] girlfriend, who personally observed Mr Flowers'[s] depression, attention deficits, substance abuse, and seizures. Ms Boutwell was never contacted by trial counsel. See Affidavit of Joe Ann Boutwell (Pet. Ex. 597).

"• Francis Harrelson, Mr. Flowers'[s] aunt, who cared for Mr. Flowers as a child and personally observed his mother's persistent alcoholism, including binge drinking while she was pregnant with Mr. Flowers. Ms. Harrelson also personally observed specific cognitive deficits and disabilities in Mr. Flowers, as well as Mr. Flowers neglectful upbringing. Ms. Harrelson was never contacted by trial counsel. See Affidavit of Francis Harrelson (Pet. Ex. 598)

"• Nancy Boutwell Barbarow, a close friend of Mr. Flowers'[s] family, who 'regularly saw [Mr. Flowers's mother] drink 10 or more beers at a sitting ... during the period when she was pregnant with Timothy,' including 'non-stop drinking binges for days.' Ms. Barbarow further observed Mr. Flowers'[s] seizures, depression, and attention problems as a child. Ms. Barbarow would have additionally testified that Mr. Flowers 'is fundamentally a good person' and 'it was very out of character for [Mr Flowers] to be involved in an offense

like this.' Yet Ms. Barbarow was never contacted by trial counsel. See Affidavit of Nancy Boutwell Barbarow (Pet. Ex. 599).

"• Lechia Rackard, Mr. Flowers'[s] cousin, who had personal knowledge of 'a long history' of mental illness, alcoholism and substance abuse in Mr. Flowers'[s] family. Ms. Rackard personally observed Mr. Flowers'[s] mother drinking alcohol while pregnant with Mr. Flowers, personally observed seizures Mr. Flowers suffered as a child, and personally observed the neglect and abuse inflicted on Mr. Flowers by his father. Ms. Rackard would have further testified that Mr. Flowers was non-violent, 'sensitive to the feeling of others,' and a 'loving father to his son Blake.' Ms. Rackard was never contacted by trial counsel. See Affidavit of Lechia Rackard (Pet. Ex. 600).

"• Kathy Rolin, Mr. Flowers'[s] cousin, who would have provided additional testimony similar to Ms. Rackard's. Ms. Rolin was never contacted by trial counsel. See Affidavit of Kathy Rolin (Pet. Ex. 601).

"• Hannah Johnson, Mr. Flowers'[s] younger sister, who personally observed Mr. Flowers'[s] abusive, impoverished, and neglectful upbringing. Ms. Johnson would have further testified that Mr. Flowers was loving and generous. Ms. Johnson was never contacted by trial counsel. See Affidavit of Hannah Johnson (Pet. Ex. 602).

"• Tasha Tichinel, one of Mr. Flowers'[s] ex-girlfriends, who would have testified that Mr. Flowers was a 'good person' who was 'always a complete gentleman' and 'never aggressive or violent.' Ms. Tichinel also would have testified that Mr. Flowers never had a father figure because his father was an abusive alcoholic who was chronically absent. Ms. Tichinel was never contacted by trial counsel. See Affidavit of Tasha Tichinel (Pet. Ex. 605).

"• Dr. Marsha Raulerson [is] a pediatrician who treated Mr. Flowers after he suffered a severe head injury in a car accident when he was three years old. Dr. Raulerson would have testified, among other things, that Mr. Flowers was taking medicine for a seizure disorder at the time of the car accident and that Mr. Flowers may have developed brain damage due to the severe neglect and abuse he suffered as a child.

"• Dr. Raulerson would have further testified that Mr. Flowers may have suffered further injury to his brain due to pre-natal alcohol exposure and as a result of the injuries he suffered in the car accident. Dr. Raulerson was never contacted by trial counsel. See Affidavit of Marsha Raulerson (Pet. Ex. 607).

"Trial counsel called none of these witnesses to testify in the penalty phase of Mr. Flowers'[s] trial, or at Mr. Flowers'[s] sentencing hearing. Accordingly, the judge and jury heard none of this evidence in deciding whether Mr. Flowers should live or die. At Mr. Flowers'[s] Rule 32 hearing, trial counsel provided no strategic justification for

ignoring these witnesses, beyond the mistaken belief that Mr. McCall would provide all necessary mitigation evidence.

"Had counsel conducted a sufficiently thorough investigation in a reasonable amount of time, they would have exposed a trove of additional witnesses and records, opening up many additional avenues for their mitigation presentation. For example, when counsel only had three lay-witness prospects -- because counsel only interviewed those three -- they had little choice but to make Mr. Flowers'[s] sister, Teresa Coleman, the sole star witness to tell Mr. Flowers'[s] entire story. But had counsel conducted a sufficiently thorough investigation, they would have had dozens of prospective witnesses.

"The haphazard nature of trial counsel's decisions is illustrated by counsel's truncated process of deciding not to present the mother of Mr. Flowers'[s] child, Rebecca Boutwell. She was, according to trial counsel's later testimony, 'immediately' ruled out as a witness without anyone on the defense team having spoken with her. See Testimony of Hallie Dixon, Rule 32 Hearing Tr. (June 10-11, 2013) at 69-72. Ms. Dixon attempts to account for her failure to contact Ms. Boutwell as a strategic decision by stating that they did not try to track down Ms. Boutwell because they thought she would have harmful things to say. Id. However, Ms. Boutwell's testimony could have been helpful to Mr. Flowers'[s] mitigation case.

"Ms. Boutwell finally did get the opportunity to testify on Mr. Flowers'[s] behalf during his Rule 32 hearing. There, Ms. Boutwell described how Mr. Flowers suffered horrible poverty and neglect throughout his childhood due to his alcoholic parents, but that he nevertheless tried to be a good father himself. See Testimony of Rebecca Boutwell, Rule 32 Hearing Tr. (June 10-11, 2013) at 203:18-251:9. She further testified that Mr. Flowers began self-medicating with drugs to cope with the psychological trauma caused by his mother's

death, id. at 210:2-213:20, and that he suffered from seizures throughout the time they were dating, id. at 216:2-219:16. The jury never heard this vital information, and instead, voted on whether Mr. Flowers should live or die without knowing the full extent of his circumstances or background. Cf. Porter v. McCollum, 558 U.S. 30, 41 (2009), citing Strickland, 466 U.S. 668 at 700 ('This is not a case in which the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." The judge and jury at [defendant's] original sentencing heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability.'); Wiggins, 539 U.S. at 525 ('(A]ny reasonably competent attorney would have realized that pursuing the leads suggested by this information was necessary to making an informed choice among possible defenses....').

"Similarly, trial counsel's purported decision not to present Mack and Francis Harrelson, Mr. Flowers'[s] aunt and uncle, was uninformed because no one on the defense team even attempted to contact or interview them. See Testimony of Aaron McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 39; Pfeifer Dep. (Pet. Ex. 867) at 92, 192; Affidavit of Francis Harrelson (Pet. Ex. 598) at ¶ 38 (stating that she was never contacted by trial counsel). Had counsel bothered to contact Francis Harrelson, she would have offered helpful testimony describing Mr. Flowers'[s] background, including his mother's heavy drinking during her pregnancy and his childhood, his frequent seizures, and his tumultuous family life. See Affidavit of Francis Harrelson (Pet. Bx. 598).

"The additional evidence that trial counsel failed to present would have been qualitatively different than the limited evidence they did present. The additional evidence would have demonstrated to the jury that Mr. Flowers is a fundamentally good person who suffered from years of poverty, neglect, and abuse as a child, no doubt adversely affecting his ability to process information, make sound moral judgments, and

distinguish right from wrong. See Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ('[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.') (internal citation omitted). The only lay testimony trial counsel presented was that Mr. Flowers was a loving person, a hard worker, and a follower who was manipulated by an older, abusive woman and the hardened criminals with whom she associated, and that he was a very warm, friendly, and caring person. The judge and jury heard almost no live testimony about his horrendous home life or any other information to explain in detail the extreme extent of abuse and neglect he experienced as a child. This sparse, general testimony barely scratched the surface of Mr. Flowers'[s] severe cognitive deficits and arduous family life.

"When examined against the backdrop of all the evidence that was reasonably available to counsel -- but which counsel did not know about due to their deficient investigation -- it is clear that the decisions made by trial counsel were objectively unreasonable. The fact that counsel only had a limited number of options for their mitigation case on the day of trial was the direct result of counsel's own failure to investigate and obtain the mitigating testimony that existed. The evidence of Mr. Flowers'[s] incredibly difficult childhood and family situation, discovered and presented by his Rule 32 counsel, is exactly the kind of information that could have moved the jury to recommend and the court to impose a sentence lesser than death.

"Notwithstanding the mitigating evidence that was omitted during the sentencing phase, two jury members voted against death. ... Had the jury heard the additional evidence, there is a reasonable probability that it would not have recommended the death penalty -- a recommendation the Court would

have given 'certain deference.' See April 16,2002 Sentencing Order at 14."

(C. 1315-28).

The circuit court's findings are supported by the record. Flowers presented evidence from numerous witnesses detailing the horrific circumstances in which he was born and raised. The circuit court accurately summarized evidence indicating that Flowers's father was an alcoholic and his mother habitually consumed alcohol during her pregnancy with him and after he was born. Witnesses explained that Flowers suffered from seizures as a child and was involved in a car accident that resulted in a traumatic head injury. The circuit court correctly detailed witnesses' accounts of the severe neglect in which Flowers was reared.

On appeal, the State argues that the circuit court's findings are incorrect. In support of its argument, the State focuses on evidence favorable to its position and, in essence, argues that the circuit court's fact finding and credibility choices were erroneous. For instance, the State argues that trial counsel made a reasonable decision to rest its penalty-phase defense on Flowers's sister, Teresa Coleman. However, evidence presented at the Rule 32 hearing indicated that, due to McCall's lack of investigation, trial counsel had no choice but to base their defense on Coleman. The State also argues that the circuit court erroneously found from counsel's testimony that they had not spoken with Rebecca Boutwell. According to the State, counsel testified that she did not remember whether she had spoken with Boutwell; therefore, the circuit court should have presumed that they had. While that may be true, Boutwell testified that counsel had never spoken to her.

In any event, "'"[t]he weight of the evidence, and the credibility of the witnesses, and inferences to be drawn from the evidence, where susceptible of more than one rational conclusion, are for the [finder of fact] alone."'" Surratt v. State, 143 So. 3d 834, 842 (Ala. Crim. App. 2013) (quoting Turrentine v. State, 574 So. 2d 1006, 1009 (Ala. Crim. App. 1990), quoting in turn, Walker v. State, 416 So. 2d 1083, 1089 (Ala. Crim. App. 1982)). As the Alabama Supreme Court has explained:

> "[W]hen a court hears ore tenus evidence in a nonjury case, its ruling based on that evidence is presumed correct and will be overturned only if clearly erroneous or manifestly unjust. Parker v. Barnes, 519 So. 2d 945 (Ala. 1988); Reliance Insurance Co. v. Substation Products Corp., 404 So. 2d 598 (Ala. 1981). Its findings of fact will not be disturbed on appeal if they are supported by the evidence or any reasonable inference therefrom. First Alabama Bank of Montgomery, N.A. v. Coker, 408 So. 2d 510 (Ala. 1982). The presumption of correctness is especially applicable where, as here, the evidence was conflicting. Leslie v. Pine Crest Homes, Inc., 388 So. 2d 178 (Ala. 1980). The weight to be given the witnesses' testimony was for the trial judge, because he had the opportunity to view the witnesses and their demeanor. Jones v. Estelle, 348 So. 2d 479 (Ala. 1977)."

Craig v. Perry, 565 So. 2d 171, 175 (Ala. 1990). Here, the circuit court's inferences and findings of fact are supported by evidence. Therefore, this Court has no basis to overturn its decision.

C.

The circuit court further found that trial counsel were ineffective for failing to present evidence that Flowers suffered from fetal-alcohol related brain damage. Specifically, the circuit court found:

> "Mr. Flowers was also denied effective assistance of counsel because, despite their awareness from the earliest stages of the case that Mr. Flowers'[s] mother drank heavily while she was pregnant with him, trial counsel failed to retain proper experts, and to effectively instruct the one expert they did retain....
>
> "...
>
> "1. As a result of their failure to investigate, trial counsel missed overwhelming evidence that Mr. Flowers

> suffers from brain damage and other serious cognitive disabilities.

"Of all the evidence trial counsel failed to identify and present to the jury, the omission of evidence regarding Mr. Flowers'[s] cognitive impairments and his mother's alcoholism was probably the most prejudicial. 'Prenatal exposure to alcohol during pregnancy damages the developing fetus and is a leading preventable cause of birth detects and developmental disabilities.' See Centers for Disease Control and Prevention, Guidelines for Identifying and Referring Persons with Fetal Alcohol Syndrome (Oct. 28,2005) (Pet. Ex. 869) at 1. Mr. McCall and trial counsel were well aware from at least May 2001 that Mr. Flowers'[s] 'mother was a chronic alcoholic and consumed alcohol during her pregnancy with him.' See Testimony of A. McCall, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 17:5-7. Indeed, Mr. McCall specifically noted in May 2001 that 'fetal alcohol syndrome ... was an area of investigation [he] wanted to develop as part of the investigation into particular facts concerning Mr. Flowers'[s] development,' based on what Mr. McCall learned in his very first meeting with Mr. Flowers and trial counsel. Id. at 16:21-17:17; see also id. at 17:18-22 ('Q: So, you knew as of May 10th, 2001 that the possibility that Mr. Flowers suffered from fetal alcohol syndrome was something that needed to be followed up and investigated, right? A: It was something that I suspected.').

"Mr. McCall testified that in order 'to properly follow up and investigate [the possibility of] fetal alcohol syndrome,' he was 'looking for a neurologist, someone ... with a medical background that could actually test and determine [Mr. Flowers'] developmental bench marks, or as he developed throughout his life.' Id. at 17:23-18:4. Trial counsel were equally aware from the very beginning that Mr. Flowers'[s] mother 'was abusing alcohol before [his] birth' which 'would mean [Mr. Flowers] could have ... fetal alcohol syndrome which would affect his cognitive development, among other

things,' Pfeifer Dep. (Pet. Ex. 867) at 77:4-75:7; see also id. at 225:15-226:6 (admitting trial counsel 'early on ... flagged fetal alcohol syndrome as a potential issue'). Yet, counsel presented absolutely no evidence at trial to support this theory.

"Alisa Rolin, Francis Harrelson, Nancy Boutwell Barbarow, and Lechia Rackard are among the witnesses who would have provided testimony about Mr. Flowers'[s] mother's drinking problems, including first-hand observations of Mrs. Flowers drinking while pregnant with Mr. Flowers. For instance, Ms. Barbarow 'conservatively estimate[d]' that she personally saw Mr. Flowers'[s] mother 'drink 10 or more beers in a sitting at least 18 times during the time she was pregnant with Timothy.' See Affidavit of Nancy Boutwell Barbarow (Pet. Ex. 599). Ms. Rolin, Ms. Harrelson, Ms. Rackard, and others reported similar observations. See, e.g., Affidavits of Alisa Rolin, Francis Harrelson, and Lechia Rackard (Pet. Ex. 593, 598, and 600).

"Moreover, Paula Jernigan, Paula Mathis, and Francis Harrelson would have provided detailed testimony about specific cognitive impairments Mr. Flowers suffered.... For instance, among other things, Ms. Jernigan observed that Mr. Flowers:

"• Suffered from noticeable attention deficit problems;

"• Had difficulty following instructions and organizing tasks;

"• Was easily distracted, forgetful, and impulsive;

"• Could not exercise judgment, prioritize activities, plan and organize his time, solve problems, or see the 'big picture';

"• Could not balance risks against rewards and had struggled to process and interpret information about the world around him.

"See Affidavit of Paula Jernigan (Pet, Bx. 591) at 2-3. Ms. Mathis, Ms. Harrelson, and others reported similar observations. See, e.g., Affidavits of Paula Mathis and Francis Harrelson (Pet. Ex. 592 and 598). Additionally, many other witnesses reported that Mr. Flowers suffered from a seizure disorder throughout his childhood. As explained below, seizures can be a symptom of brain damage (such as brain damage due to pre-natal alcohol exposure), and also a potential contributing cause of further brain damage. Nevertheless, trial counsel presented the judge and the jury with no evidence whatsoever of Mr. Flowers'[s] pre-natal alcohol exposure or resulting brain damage and cognitive deficits.

"Trial counsel's failure to present this important evidence prejudiced Mr. Flowers'[s] mitigation case because the evidence leaves little doubt that Mr. Flowers suffers from brain damage due to pre-natal alcohol exposure, and little doubt about its adverse effects. At Mr. Flowers'[s] Rule 32 hearing, a board-certified neuropsychiatrist and two other neuropsychologists with expertise in the effects of fetal alcohol exposure testified that Mr. Flowers has a clear-cut case of brain damage due to his mother's heavy drinking while pregnant. These experts testified that Mr. Flowers has severe neurological problems, which impair his ability to exercise judgment, process information, and make independent decisions. Testimony from friends, family members, and teachers supports this conclusion.

"Evidence of Mr. Flowers'[s] brain damage would have been highly relevant to the Court and the jury in determining the appropriate punishment for Mr. Flowers'[s] involvement in a crime orchestrated by an older ex-convict and several others. See R-1219. (where the State described the various roles of Mr. Flowers'[s] co-defendants including Buckshot as 'the

planner, the one that got it together, no doubt about that'). Due to trial counsel's inadequate investigation and failure to present this testimony, however, the judge and jury never heard this highly significant available mitigating evidence.

"...

"At Mr. Flowers'[s] Rule 32 hearing, the testimony of three experts on fetal alcohol exposure and brain damage confirmed it was prejudicial error not to present such evidence at trial. Mr. Flowers was convicted and sentenced to death in 2002. After Mr. Flowers had exhausted his direct appeals, his Rule 32 counsel retained the additional experts Mr. McCall and Dr. Goff had earlier recommended to trial counsel: a neuropsychiatrist and two neuropsychologists with decades of collective expertise in neurology, the effects of pre-natal alcohol exposure, seizure disorder, and brain damage in general:

"• Dr. James Merikangas, a board-certified neuropsychiatrist, who has served as a consultant with the National Institute of Mental Health and a clinical professor at George Washington University School of Medicine, Virginia Commonwealth University, and Georgetown University Medical School in the subjects of psychiatry and of behavioral neuroscience. See Testimony of Dr. James Merikangas, Rule 32 Hearing Tr. (Aug. 5-6,2013) at 245:7-246:8.

"• Dr. Allan Mirsky, a board-certified neuropsychologist with 55 years of experience in brain and behavioral issues who helped pioneer the study of fetal alcohol spectrum disorders. Dr. Mirsky has worked at Walter Reed National Military Medical Center, the National Institute of Health, and the Boston University Department of Psychiatry. See Testimony of Dr. Allan Mirsky, Rule 32 Flearing Tr.

(Aug, 5-6, 2013) at 66:9-19, 73:5-19, 75:11-77:19.

"• Dr. Daniel Marson, a clinical neuropsychologist, professor of neurology, and director of the division of neuropsychology at the University of Alabama at Birmingham. Dr. Marson is a member of the American Neurological Association and frequently administers and evaluates neuropsychological tests to determine the presence or absence of brain injury. See Testimony of Dr, Daniel Marson, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 149:17-23, 155:25-157:13.

"Mr. Flowers'[s] Rule 32 experts tested and examined Mr. Flowers and reviewed the voluminous evidence which trial counsel failed to discover or present at trial. They found that Mr. Flowers suffers from permanent irreversible brain damage caused by pre-natal alcohol exposure. More specifically, Dr. Merikangas, Dr. Mirsky, and Dr. Marson agree that Mr. Flowers'[s] brain damage significantly impedes his ability to process information, exercise judgment, and make independent decisions, among other things. Their findings confirm beyond doubt what trial counsel suspected all along but failed to investigate or present to the jury. ...

"Dr. Merikangas is a neuropsychiatrist with expertise in neurology and psychiatry. Neurology is a medical specialty dealing with diagnosis and treatment of diseases and conditions of the brain, spinal cord, and nerves. See Testimony of Dr. James Merikangas, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 248:18-24. Psychiatry deals with diseases and conditions of the mind such as, for example, mood, thinking, perception, anxiety, and depression. Id. at 248:25-249; 11. Psychiatry differs from psychology in that psychiatry is a medical discipline whereas psychology is a non-medical discipline dealing with thinking, feeling,

perception, and cognition. Id. at 249:12-22. As a neuropsychiatrist, Dr. Merikangas is qualified to medically diagnose brain damage and to determine its potential causes and effects. Id.

"Based on his review of the available evidence, medical literature, and his personal examination of Mr. Flowers, Dr. Merikangas conclude[d]:

> "Mr. Flowers is a man with congenital brain damage. ... [H]e was born with brain damage; and ... he has also acquired brain damage through the course of his early development in life; and ... this brain damage is probably the result of maternal ingestion of alcohol and brain trauma ... [Mr. Flowers'[s] brain damage is] permanent. It's irreversible. He has what's called static encephalopathy.

"Id. at 253:7-16.

"Dr. Merikangas testified that the effects of Mr. Flowers'[s] brain damage are profound:

- "'[A]lthough he has a normal IQ, which simply is a gross measure of intelligence, [Mr. Flowers] has problems with perceiving events, controlling his impulses and with interpreting what's going on around him.'

- "'He's prone to abusing drugs and alcohol because of his brain damage."

- "'[H]e suffers from seizures, or has suffered from seizures rather, he was an epileptic.'

- "'[H]e has had, as a result of that, lapses of consciousness.'

- "'[H]is ability to deal with the world, his adaptive ability, is quite impaired because of brain damage.'

"• "[T]herefore, [Mr. Flowers is] subject to duress and to influence and manipulation by others who are more clever and skilled in dealing with events.'

"• 'He has problems with his memory and problems with his perception of the world.'

"Id. at 253:24-254:12.

"Moreover, Mr. Flowers'[s] brain damage 'severely affects his judgment, his ability to understand situations, his ability to manage his own affairs, and his impulse control. He acts without thinking and without understanding the consequences.' Id. at 342:21-24. His brain damage limits Mr. Flowers'[s] ability to plan and foresee the consequences of his actions (i.e., executive functioning), his ability to balance risks and rewards of potential actions, and makes Mr. Flowers 'more susceptible to relying on other peoples' judgments' because 'he's a follower.' Id. at 343:13-344:2. These characteristic mental disabilities are hallmarks of prenatal alcohol exposure and would have been directly relevant to Mr. Flowers'[s] mitigation defense at trial, particularly given the circumstances of Mr. Flowers involvement in the alleged offense.

"Dr. Merikangas holds these opinions to a reasonable degree of medical certainty based on his examination of Mr. Flowers, and the evidence and literature he reviewed. Id. at 330:16-17. In formulating his opinions, Dr. Merikangas reviewed neuropsychological tests conducted by Dr. Marson, Dr. Mirsky, and others; materials from Dr. Merikangas'[s] examination of Mr. Flowers; dozens of medical and scientific articles regarding fetal alcohol exposure, brain damage, and related subjects; hundreds of pages of Mr. Flowers'[s] medical and educational records; and sworn affidavit testimony from dozens of Mr. Flowers'[s] friends, family members, and others with direct knowledge of Mr. Flowers'[s] personality, health, medical and

family history, and cognitive functioning. See Key Documents Review by Dr. James Merikangas (Pet Ex. 873).

"Dr. Merikangas also reviewed the trial record and studied the circumstances of Tommy Philyaw's abduction and Mr. Flowers involvement. The facts led Dr. Merikangas to conclude 'I don't think [Mr. Flowers] was a willing participant, I think he was under duress,' because Mr. Flowers'[s] brain damage likely caused him to 'decompensate in [his] ability to deal with reality.' Id. at 346:1-9. Dr. Merikangas specifically noted the following based on his review of the trial testimony:

- "• Five days prior to the eventual attack on Tommy Philyaw, Buckshot asked Mr. Flowers to attack and rob Mr. Philyaw but Mr. Flowers 'turned that offer down several times' and told Buckshot he wanted 'no part of it.' Id. at 344:24-345:4; see also R-970 and R-1100-1101.

- "• On the night of the crime, Buckshot again suggested robbing Mr. Philyaw and again Mr. Flowers 'tried to get out of that situation.' Id. at 345:4-12; see also R-589-662.

- "• After Buckshot and his gang ultimately kidnapped and assaulted Mr. Philyaw, Buckshot 'instructed' Mr. Flowers to fire a gun at Mr. Philyaw's body in the back of a pickup truck. Id. at 344:20-22; see also R-976-977.

"Accordingly, Dr. Merikangas concludes that Mr. Flowers'[s] brain damage 'made him vulnerable to manipulation by those around him on the night of the offense' and 'prevented [him] from exercising judgment in foreseeing the consequences of his actions' in the face of overbearing pressure from Buckshot and others; in short, that '[Mr. Flowers] is impaired in his ability to deal with that kind of

situation and get out of it.' Id. at 345:19-346:9. This is precisely the sort of testimony that was most crucial to present at the penalty phase of Mr. Flowers'[s] trial and at his sentencing hearing.

"Dr. Merikangas also testified that Mr. Flowers suffers from significant psychological and neurological problems in addition to those caused by his pre-natal alcohol exposure. In particular, Dr. Merikangas testified:

> "[Mr. Flowers grew up] in a dangerous and toxic place ... with an alcoholic mother and father who was either absent or neglectful and harmful when he was present; and that [Mr. Flowers] found his mother dead when he was 16, [which] was a major emotional shock to his system, caus[ing] him further depression and difficulty with his adolescent growth.

"Id. at 348:19-349:3.

"Dr. Merikangas further testified that it is well recognized that traumatic family experiences can cause emotional and psychological damage and adversely affect a child's developing neurological functions. Id. at 346:13-347:2. In Dr. Merikangas'[s] opinion, the environment in which Mr. Flowers grew up would have prevented him from learning 'right from wrong,' prevented him from receiving 'the kind of support and love that's required for human beings to grow and develop normal personalities,' and prevented him from 'learn[ing] societal norms." Id. at 347:3-348:18.

"Evidence that Dr. Merikangas reviewed regarding Mr. Flowers'[s] childhood include sworn testimony from Alisa Rolm (Pet. Ex. 593), Francis Harrelson (Pet. Ex. 598), Lechia Rackard (Pet. Ex. 600), Kathy Rolin (Petp Ex. 601), Hannah Johnson (Pet. Ex. 602), Tasha Tichinel (Pet. Ex. 605), and Dr. Marsha Raulerson (Pet. Ex, 607); See also Key Documents Review by Dr. James Merikangas (Pet. Ex. 873) at 21.

"Dr. Raulerson's testimony is particularly compelling. Dr. Raulerson is a pediatrician specializing in childhood abuse and neglect. Dr. Raulerson treated Mr. Flowers for injuries he suffered in a drunk driving accident with his mother when he was a toddler. See Affidavit of Dr. Marsha Raulerson (Pet. Ex. 607) at ¶ 4. As Dr. Merikangas testified, Dr. Raulerson observed that Mr. Flowers 'was a terrible case of neglect [and] considered him a thrown away child, who was physically, emotionally abused and neglected,' See Testimony of Dr. Merikangas, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 348:4-10. Dr. Raulerson was never contacted by trial counsel and never given the opportunity to testify at Mr. Flowers'[s] trial. See Affidavit of Dr. Marsha Raulerson (Pet Ex. 607) at ¶ 34 (stating that she 'would have willingly testified and explained what is set forth in [her] affidavit to the jury and the Court'). Dr. Raulerson reported several relevant observations in her affidavit testimony.

"Mr. Flowers suffered a severe head injury in the accident, 'so serious that a Penrose drain was put in to his head in order to drain blood from under the scalp, something which is almost never done.' Id. at ¶ 17. In Dr. Raulerson's opinion, 'this type of blow to the head and injury suffered by Mr. Flowers can and very well may have caused damage to Mr. Flowers'[s] brain ... even though a CAT scan [subsequently] showed no structural abnormalities.' Id. at ¶ 20.

"Moreover, Mr. Flowers was suffering from 'truly alarming' neglect at the time of the accident. Id. at ¶ 18. Dr. Raulerson was so 'alarmed at the obvious signs of neglect and child endangerment that she 'alerted the state's child services agency [and] called Alabama Pension and Securities about the bad social situation.' Id. at ¶ 21. Dr. Raulerson was particularly concerned that both of Mr. Flowers'[s] parents arrived at the hospital visibly drunk, and that Mrs. Flowers had been drunk at the time of the car accident, id. at ¶ 17, and further concerned

that Mr. Flowers was 'already very sick' at the time of the car accident, with a fever, anemia, ear infection, gum disease, cavities, and a pre-existing seizure disorder, id. at H ¶ 18. Dr. Raulerson specifically noted that Mr. Flowers 'had a seizure disorder, but ... was receiving insufficient Phenobarbitol to treat the disorder' when he was admitted to the hospital after the car accident. Id. at ¶ 18.

"Consistent with Dr. Merikangas'[s] testimony, Dr. Raulerson concurs there is 'powerful evidence of the dramatic impact of neglect and abuse on children,' including a 'strong relationship between parental alcohol abuse and adverse childhood experiences,' such as Mr. Flowers experienced. Id. at ¶ 15. 'Based on [her] education and experience as a teacher as well as a medical doctor,' Dr. Raulerson stated, '[she] know[s] that it is very difficult for intellectual, emotional, and social learning to take place under these conditions.' Id. at ¶ 27.

"Several of Mr. Flowers'[s] relatives provided even more detailed accounts of the physical and emotional neglect Mr. Flowers suffered as a child. Testimony regarding the damaging effects of Mr. Flowers'[s] traumatic family life would have been strong mitigating evidence at trial for the reasons Dr. Merikangas and Dr. Raulerson explained. Such expert testimony should have and would have come from a clinical psychologist recommended by Aaron McCall, if trial counsel had diligently followed up on their initial request for funding. ....

"...

"Dr. Marson and Dr. Mirsky conducted their own examinations of Mr. Flowers. They administered neuropsychological tests to probe specific domains of Mr. Flowers'[s] cognitive functioning, particularly those domains known to be affected by pre-natal alcohol exposure. See Key Test Results

(Pet. Ex. 871). Their conclusions fully support Dr. Merikangas'[s] diagnoses.

"Dr. Mirsky: Dr. Mirsky is a board-certified neuropsychologist with 55 years of experience 'assess[ing] brain damage on the basis of neuropsychological tests' in cases involving brain injury, brain diseases, and genetic disorders. Testimony of Dr. Alan Mirsky, Rule 32 Hearing Tr. (August 5-6, 2013) at 72:10-73:14. Neuropsychology is 'the study of the relationship between brain and behavior.' Id. at 72:21-23. Dr. Mirsky has worked with Dr. Ann Streissguth since the 1990s on pioneering research on the causes and effects of pre-natal alcohol exposure. Id. at 74:22-77:24.

"Dr. Mirsky administered several neuropsychological tests designed to measure various aspects of Mr. Flowers'[s] attention and executive functioning. See Key Test Results (Pet. Ex. 871). Dr. Mirsky also reviewed the results of neuropsychological tests administered by Dr. Marson and others designed to measure various aspects of Mr. Flowers'[s] memory, executive functioning, adaptive functioning, and achievement. Id.; see also Key Documents Reviewed (Pet. Ex, 870).

"It is Dr. Mirsky's opinion that Mr. Flowers'[s] neurological tests show he suffers from pronounced cognitive deficits in the following areas which are indicative of brain damage due to fetal alcohol exposure:

"• Impaired auditory and visual attention, with much more significant impairment in the auditory domain. Id. at 98:13-99:20 (noting that Mr. Flowers'[s] 'response time variability [was] almost 8 standard deviations below the mean ... way off the charts'). Dr. Mirsky testified that 'this is a consistent finding in children with fetal alcohol spectrum disorder.' Id. at 100:13-14; See also id. at 100:15-102:22 (explaining why auditory attention is

significantly impaired by fetal alcohol exposure).

"• Poor attention as measured by the 'letter cancellation' test, on which Mr. Flowers scored in the 4th percentile. This test is also 'very sensitive to the effects of maternal alcohol consumption.' Id. at 103:2-22.

"• 'Substantial' hyperactive and impulsive tendencies -- rated 'highly inattentive' -- as measured by the Conners rating scale. Dr. Mirsky testified that '99 percent of the population is better than [Mr. Flowers] with respect to this particular aspect of behavior,' which is also seen in children who have been exposed to pre-natal alcohol. Id. at 103:23-105:13.

"• Overall 'severe[] impairment in the domain of attention.' Id. at 105:11-13.

"• 'Severely impaired' memory with particular impairment in visual-spatial memory. Id. at 105:14-107:16. This, too, 'would certainly be consistent with' pre-natal alcohol exposure, according to Dr. Mirsky. Id.

"• 'Severely impaired' executive functioning, suggesting that Mr. Flowers has significant damage to the right hemisphere of his brain, consistent with pre-natal alcohol exposure. Id. at 107:18-111:8.

"• 'Very poor[]' adaptive functioning in areas such as communication, daily living skills, and ability to get along in the world, with especially low scores in mathematics. Id. at 111:16-113:20.

"Significantly Mr. Flowers did not exhibit impaired performance on 'each and every test and on

all aspects of each domain of brain functioning given to him.' Id. at 113:21-25. Indeed, Mr. Flowers has a relatively average IQ and scores within the normal range on certain other tests. Id. at 114:1-14. However, Dr. Mirsky testified that such variability, or 'peaks and valleys,' is 'what you see all the time when you test a person with brain damage.' Id. Thus, the fact that Mr. Flowers performed reasonably well on some tests and so poorly on others simply reinforces that he suffers from brain damage due to pre-natal alcohol exposure, as Dr. Merikangas concluded.

"Dr. Mirsky found ample evidence that Mr. Flowers suffers and suffered from, now and at the time of the offense, brain damage due to fetal alcohol exposure and other traumatic insults to his brain:

"• 'Mr. Flowers'[s] brain was damaged beginning during the time he was a fetus, the time he was in his mother's wom[b] so to speak, as a result of fetal alcohol intoxication.' Id. at 67:15-68:10.

"• 'There were other indications of brain damage; the fact that he had seizures as an infant; and, in addition to that, seizures throughout his life. Also, there was evidence of injury to the brain that occurred as a teenager -- which occurred when he was a teenager; he was hit by a piece of iron.' Id.

"• 'In addition to that, there was a lot of evidence suggesting that he was malnourished as a child, which would lead to inadequate brain development which manifests not only early on but later on in terms of the adult development possibilities. We know from extensive research that damage early in life can lead to kind of an inadequate ability to reach

> adult cognitive skill, adult abilities; ample research to support this.' Id.

"Dr. Mirsky further concluded that Mr. Flowers'[s] brain damage 'would have many [adverse] affects' on his ability to function in the everyday world, including:

> "• Mr. Flowers'[s] 'ability to appreciate the consequence of his action.'
>
> "• His 'ability to plan ahead [and] lead.'
>
> "• His 'ability to engage in what we call executive functions which would be expected of any person.'
>
> "• His 'ability to communicate with others [and] care for himself.'

Id. at 69:13-24.

"Dr. Marson: Dr. Marson is also a neuropsychologist with expertise administering and interpreting neuropsychological tests to determine the presence or absence of brain damage. See Testimony of Dr. Daniel Marson, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 154:24-155:20. Dr. Marson likewise administered neuropsychological tests to Mr. Flowers and reviewed the results of tests administered by the other neuropsychologists who have examined Mr. Flowers. Id. at 158:4-159:24. Dr. Marson agrees with Dr. Mirsky and Dr. Merikangas that Mr. Flowers'[s] test results show severe or significant impairments across several domains, moderate to no impairments in other domains, and that this pattern is indicative of fetal alcohol syndrome or fetal alcohol spectrum disorder. Dr. Marson concluded:

> "[Mr. Flowers] does suffer brain damage, that was incurred both prenatally and also postnatally ... I think he suffers from fetal alcohol spectrum

> disorder. I think that he subsequently, due to his epilepsy and other seizures, the fact that ... he grew up in really horrific psychosocial circumstances, the fact that he suffered ... a significant head injury at age 3, I think there are many different forms of injury that cumulatively gave rise to the brain injury that has again been discussed.

"Id. at 150:20-151:4. In Dr. Marson's view:

> "When you pull all of this together ... the cognitive impairment, the impairments in personality functioning, the impairments in adaptive functioning, you see someone at the time of the crime at age 18 who has a lot of difficulty perceiving events realistically; who has trouble forming judgments about the actions and intentions of others; who has, I think, difficulty anticipating the consequences of his own behavior; someone who is very prone to act impulsively; and, really, finally someone who really can't socially problem solve, who was, I think, very unable to extricate himself from a difficult social situation ... that was rapidly evolving into a dangerous one.

"Id. at 152:13-153:5.

"Dr. Marson's opinions thus further support the opinions of Dr. Merikangas and Dr. Mirsky. Moreover, Dr. Marson administered a Rorschach test to Mr. Flowers. The Rorschach results suggest specific mental deficiencies which likely impair Mr. Flowers'[s] ability to interact with others, function in the real world, and may explain how he came to be involved in the crime for which he was convicted. As Dr. Marson explained, the Rorschach shows that Mr. Flowers 'doesn't perceive things realistically like other people do. [It tells] us that he's someone who can easily misjudge the

> actions and intentions of someone else. He's someone who doesn't really understand and anticipate the consequence of his own actions very well.' Testimony of Dr. Daniel Marson, Rule 32 Hearing Tr. (Aug. 5-6, 2013) at 196:3-17.
>
> "In summary, Dr. Merikangas, Dr. Marson, and Dr. Mirsky conclude to a reasonable degree of medical certainty that Mr. Flowers suffers serious adverse effects from brain damage due to pre-natal alcohol exposure and other traumatic incident effecting his developing brain which, among other things, significantly impede his ability to process information, exercise judgment, and make independent decisions. Such insight into how Mr. Flowers'[s] brain damage impairs his ability to think and act would have been strong mitigation evidence at trial, if trial counsel had performed an adequate investigation to obtain and present such evidence.
>
> "...
>
> "Mr. Flowers'[s] Rule 32 experts established Mr. Flowers'[s] vulnerable condition, but trial counsel need not necessarily have gone to such great lengths to make this showing to the jury. Mr. Flowers'[s] Rule 32 experts testified that his condition would have been obvious to any competent neuropsychologist or neuropsychiatrist, if he or she was provided with the relevant records and testimony. Accordingly, trial counsel were required to at least make a reasonable effort to present some evidence and competent expert testimony at the penalty phase regarding these important and readily discoverable mitigating facts. Failure to do so was objectively unreasonable and therefore in violation of Mr. Flowers'[s] Sixth Amendment right to effective assistance of counsel."

(C. 1328-45.) The circuit court went on to detail how counsel's failure to provide Dr. John Goff, the neuropsycologist they hired, sufficient information regarding Flowers's background and life prevented the defense from discovering Flowers's brain damage.

Again, the circuit court's findings are supported by the evidence. Flowers presented lay and expert testimony regarding his mother's consumption of large amounts of alcohol during her pregnancy with him and the adverse effects that her actions had on the development of his brain. Flowers presented evidence indicating that he was severely neglected and that such neglect adversely affected his brain development. He further presented evidence that, as a child, he was involved in an car accident and suffered a severe head injury and later was hit in the head, two actions that could have led to brain damage. The circuit court also accurately described the testimony regarding the effects of Flowers's brain damage.

On appeal, the State again challenges the circuit court's fact finding and credibility choices. For instance, the State argues trial counsel investigated Flowers's mental health by hiring Dr. John Goff. The circuit court, however, held that counsel were ineffective for failing to provide Dr. Goff with the tools necessary to detect brain damage and for failing to investigate Flowers's brain damage further despite possessing information that would lead any reasonable attorney to have Flowers tested for brain damage. The State also faults the circuit court for "crediting the testimony of Flowers's three highly paid and partisan experts witnesses and by refusing to credit the testimony of ... the State's expert witness." (State's brief, at 65.). As discussed above, credibility choices after an ore tenus hearing is the province of the fact finder and will not be disturbed on appeal unless completely unsupported by the record. Craig v. Perry, 565 So. 2d 171, 175 (Ala. 1990); Surratt v. State, 143 So. 3d 834, 842 (Ala. Crim. App. 2013) ; Turrentine v. State, 574 So. 2d 1006, 1009 (Ala. Crim. App. 1990); Walker v. State, 416 So. 2d 1083, 1089 (Ala. Crim. App. 1982). Here, the circuit court's finding are supported by evidence contained in the record; therefore, there is no basis for this Court to overturn those findings.[6]

[6]The circuit court found that trial counsel's performance was deficient for additional reasons. Based on our resolution of the claims discussed in this memorandum opinion, this Court need not address those additional reasons.

D.

The State also argues that the circuit court erred by finding that counsel's deficit performance resulted in prejudice. Addressing each instance in which the circuit court held counsel's performance to be deficient separately, the State argues that counsel's performance did not prejudice Flowers.

In assessing claims of ineffective assistance of counsel in the penalty phase of a capital trial, courts must apply the standard discussed in Wiggins v. Smith, 539 U.S. 510 (2003):

> "In Strickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id., at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534.

In its order, the circuit court explained that it had considered all the evidence presented at Flowers's trial and at the Rule 32 hearing and found counsel's penalty-phase performance was prejudicial under Strickland. This Court finds no error in the circuit court's decision.

On direct appeal, this Court stated:

> "The circuit court found as aggravating circumstances that the murder was committed during the course of a kidnapping and during the course of a robbery, § 13A-5-49(4), and that the murder was especially heinous, atrocious, or cruel as compared to other capital murders, § 13A-5-49(8). The circuit court found as statutory mitigating circumstances that Flowers had no significant history of prior criminal activity, § 13A-5-51(1), Ala. Code 1975, and that Flowers was 18 years old at

> the time of the murder, § 13A-5-51(7), Ala. Code 1975. According to § 13A-5-52, Ala. Code 1975, the circuit court found as nonstatutory mitigating circumstances that Flowers lacked a stable home life, that his mother died when he was 16 years of age, that he had little formal education, and that he abused drugs. The circuit court stated in its order that it gave these nonstatutory mitigating circumstances very little weight. The circuit court then weighed the aggravating circumstances and the mitigating circumstances and sentenced Flowers to death."

Flowers v. State, 922 So. 2d 938, 960-61 (Ala. Crim. App. 2005).

Although counsel presented some evidence in mitigation at the penalty phase of the trial, that evidence paled in comparison to the evidence presented during the Rule 32 proceedings. Likewise, the evidence presented at the Rule 32 hearing was not merely cumulative to evidence presented at trial. For instance, at trial, counsel presented evidence indicating that Flowers lacked a stable home life; however, counsel omitted evidence indicating that Flowers lived in squalor and was neglected to the point of affecting his development. Counsel omitted evidence indicating that Flowers's home life was deplorable and filthy. Additionally, counsel omitted evidence that Flowers's mother drank excessively while pregnant with him resulting in fetal-alcohol related brain damage. Counsel omitted evidence indicating that Flowers's brain was further damaged by a car accident and being hit in the head. Counsel failed to present evidence indicating that Flowers's brain damage led him to be a follower who was susceptible to the manipulation of his accomplices. Reviewing all the evidence omitted by trial counsel, the circuit court found that had trial counsel not performed deficiently, there is a reasonable probability that the outcome of the trial would have been different.

"[T]he same judge who sentenced [Flowers] to death reweighed the mitigating evidence presented at trial, the mitigating evidence alleged in the Rule 32 petition, and the aggravating circumstances established at trial and found that there was [a] probability that the omitted mitigating evidence

would have altered [Flowers's] sentence." Spencer v. State, 201 So. 3d 573, 613 (Ala. Crim. App. 2015). "Because the same judge who presided over [Flowers's] trial found that the failure to present the mitigating evidence resulted in prejudice to [Flowers], we afford this finding considerable weight." State v. Gamble, 63 So. 3d 707, 721 (Ala. Crim. App. 2010). This Court finds no error in the circuit court decision.

Accordingly, the circuit court's decisions denying Flowers guilt phase relief and holding counsel ineffective in the penalty phase are affirmed.[7]

AFFIRMED IN PART; REVERSED IN PART IN A SEPARATE PUBLISHED OPINION.

Welch, Kellum, Burke, and Joiner, JJ., concur.

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[7]Today, in a separate, published opinion, this Court reversed the circuit court's decision to resentence Flowers to life without the possibility of parole and remanded the cause to the circuit court with instructions for it to set aside its order resentencing Flowers and to issue a new order granting Flowers a new penalty-phase trial.